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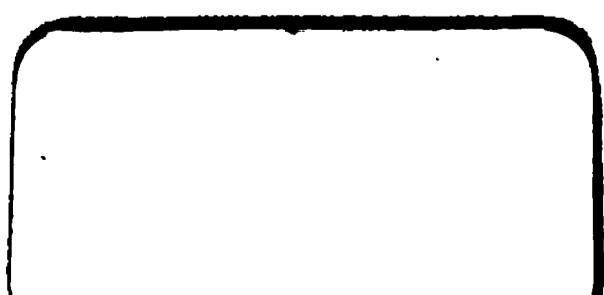
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REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

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¹ Died June 16, 1877: 12 Law Jour., 372.

² Retired on account of ill health October, 1877: 63 L. T., 417.

³ Appointed June, 1877, in place of Lord Justice MELLISH: 12 Law Jour., 386.

⁴ Appointed Nov., 1877, in place of Lord Justice AMPHLETT: 12 Law Jour., 631.

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¹ Appointed April 30, under the act of April 24, 1877: 12 Law Jour., 251.

² Resigned January, 1879: 14 Law Jour., 15; 66 Law Times, 191.

³ Appointed January, 1879, in place of Baron CLEASBY: 14 Law Journal, 34; 66 Law Times, 191.

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BEFORE THE
HOUSE OF LORDS
(ENGLISH, IRISH, AND SCOTCH)
AND THE
JUDICIAL COMMITTEE
OF
HER MAJESTY'S MOST HONORABLE
PRIVY COUNCIL.

[2 Appeal Cases, 423.]

H.L. (E.), April 27, 30, 1877.

[HOUSE OF LORDS.]

*WILLIAM CLARK, Appellant; and PATRICK ADIE, [423
Respondent.

(No. 2, see 19 Eng. R., 132.)

Patent—Licensee—Foreign Specifications—Evidence—"Parallel."

A licensee under a patent cannot, in any way, question its validity during the continuance of his license. But he may show that what he has done (in respect of which patent royalties are claimed from him) does not fall within the limits of the patent, but is something extraneous to it.

Per LORD BLACKBURN: A licensee under a patent is in a situation analogous to a tenant, who, during the tenancy, cannot dispute the title of the lessor to any of the land held under the lease; but who is, nevertheless, at liberty to show that part of the land he actually occupies is really not comprised within the lease, but belongs to himself under some other right:

Semble, that in an action on a patent, where such an issue has been raised, evidence of the existence of foreign specifications of an earlier date, preserved in and obtained from the Patent Office, might be admissible.

Observations on this matter.

The words used in a patent must be construed, like the words of any other instrument, in their natural sense, according to the general purpose of the instrument in which they are found.

In this case the word "parallel" was construed in its popular and not its purely mathematical sense.

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Clark v. Adie (No. 2).

H.L. (E.)

THIS was an appeal against an order made in the Court of Appeal on the 18th of July, 1876, by which a previous order of Vice-Chancellor Bacon, made on the 12th of April, 1876, was reversed, and by which a claim of Adie to surcharge Clark on account of certain royalties for works done as a licensee under a patent, was declared to be established.

In this case Clark was the licensee of Adie under a patent dated in October, 1866, taken out by the latter for improvements in the construction of a machine for clipping horses and shearing sheep and cattle. The patent was taken out in 1866, but was amended in 1870 by a disclaimer.

In July, 1871, Clark wrote to Adie, agreeing to take a license for the manufacture of horse-clippers under Adie's 424] amended patent, *and to pay 1s. 2d. for every horse-clipper sold. The offer was accepted "during the validity of my patent." Differences afterwards arose between the parties, and Clark insisted that the clippers he made were in fact made according to the descriptions in his own and in Grayson's patents, and were not made under the patent of Adie, and consequently were not infringements of that patent. Vice-Chancellor Bacon made an order disallowing the surcharge. On appeal that order was reversed and the surcharge was allowed. At the hearing on the appeal, Clark contended that Adie's invention was, under the terms of his specification, founded on the making of the teeth of the comb plates "parallel," and on the use of an extra third plate for increasing the depth of the hair left on the animal, and that as neither of these things was found in the clippers manufactured by him, he had not made himself liable for royalties for the use of the patent. In support of his contention he proposed also to show by evidence of certain American specifications which existed in the books of the library of the Patent Office previous to the date of Adie's patent, that what he did had been known before Adie's patent was obtained.

The Lords Justices heard the evidence *de bene esse*, expressed an opinion that it did not affect the case, and then declared that it was not properly admissible "for the purpose of construing the specification of the particular patent before us."

The appellant not only denied the fact of any infringement colorably or otherwise, but he contended first, that he was not, as licensee or otherwise, estopped from showing the extent and limits of the real nature of the invention which was the subject of Adie's patent; and, secondly, that the evidence he had tendered was properly admissible for

the purpose of construing Adie's specification, and of showing that, in machines known previously to the date of Adie's patent, some improvements which Adie claimed had been in fact applied, and so were known, and that the use of that knowledge was permissible to any one.

The respondent affirmed that there had been on the part of the appellant the use of the processes described in his specification, and consequently that the appellant had thereby rendered himself liable to the surcharge claimed, and that it was not competent to a licensee to dispute, in any way, the validity of his licensor's *patent, and [425 that for that reason the American specifications were not admissible in evidence—and farther, that though those specifications were in the library of the Patent Office, there had not been any such publication of them as would affect any patent subsequently taken out in this country, even if the processes in those specifications could be shown to resemble the processes set forth in that subsequent patent; and thirdly, it was denied that they did so.

Sir *H. Giffard*, S.G., Mr. *E. Kay*, Q.C., Mr. *Aston*, Q.C., and Mr. *Everitt*, appeared for the appellant: *Trotman v. Wood* ⁽¹⁾, *Seed v. Higgins* ⁽²⁾, *Harmar v. Playne* ⁽³⁾, *Lewis v. Marling* ⁽⁴⁾, *Fisher v. Dewick* ⁽⁵⁾, and *Belts v. Neilson* ⁽⁶⁾, were referred to.

Sir *J. Holker*, A.G., Sir *H. M. Jackson*, Q.C., and Mr. *Lawson*, appeared for the respondent, but were not called on to address the House.

THE LORD CHANCELLOR (Lord Cairns): The argument to which your Lordships listened with great care and attention on Friday last on this appeal, has not, I think, raised any doubt in any of your Lordships' minds as to the propriety of the decision of the court below, and I am prepared to submit to your Lordships that the appeal in this case ought to be dismissed.

The appellant is a licensee, who has taken a license to work a patent granted to the respondent, Mr. Adie, a patent which is dated the 30th of October, 1866, and which subsequently became subject to a disclaimer and memorandum of alteration by Mr. Adie on the 10th of August, 1870. Therefore, as between the appellant, the licensee, and the respondent Adie the patentee (whatever strangers might have to say as to the validity of this patent), the question of validity must be taken as that which the appellant is unable to dis-

⁽¹⁾ 16 C.B., 496.

⁽²⁾ 8 H. L. C., 550.

⁽³⁾ 11 East, 101.

⁽⁴⁾ 10 B. & C., 22.

⁽⁵⁾ 4 Bing. N. C., 706.

⁽⁶⁾ Law Rep., 3 Ch. Ap., 429.

pute. So far as he is concerned he must stand here admitting the novelty of the invention, admitting its utility, and 426] *admitting the sufficiency of its specification; but, on the other hand, he is of course entitled to have it ascertained what is the ambit, what is the field, which is covered by the specification as properly construed; and he is entitled to say: Inside of that field I have not come; so far as I have worked I have worked outside the limit which is covered by it, as properly construed, and therefore I am not bound to make any of those payments which are stipulated in my license as payments to be made for working the patent. In this respect the appellant, the licensee, stands here upon the same issue as would arise between a patentee and an alleged infringer upon the question of the fact of infringement. The question which your Lordships have to consider is the same which in an ordinary action for an infringement of a patent you would have to determine upon that one particular issue going to the fact of infringement, and assuming all the other issues, which ordinarily are raised upon a patent action, to be found for the plaintiff.

Now, my Lords, that being the condition of the argument as regards the appellant, the question which arises is, whether by the manufacture of two particular clipping machines, or clipping instruments, which are exhibits in the cause, he has come within the terms of the license which he has taken. [His Lordship here took up two of the machines exhibited to the House and described them, and proceeded:]

The two particulars in which Clark's manufacture is said to differ from that of the patentee are these: it is said, in the first place, that the teeth of the comb of the clipping instrument made under the letters patent are teeth which should be exactly mathematically parallel, and that the top or end of the teeth should be square, and it is said that the instrument manufactured by the appellant has the teeth not so parallel, and that they are pointed instead of being made in that square-topped manner in which the patent provides that its manufacture should be made. The other point in which it is said that the manufacture of the licensee differs from that of the patentee is this: it is said that in the patent article a provision was made according to the specification, that an additional plate should be put on the lower part of the comb for the purpose of raising the comb from the skin 427] of the *animal to be clipped, and in that way regulating the length at which the hair of the animal should be clipped; and it is said that in the manufacture of the appel-

lant there is no provision for varying in that way the length at which the hair should be clipped.

Now, my Lords, for the purpose of seeing how far in those respects the manufacture of the appellant takes him out of the terms of the patent, it is necessary to turn to the specification of the patent, and I turn to the specification as altered by the disclaimer and memorandum of alteration. In the first place I will consider the question as to what was called in the argument the parallelism of the teeth. My Lords, the only sentence of the specification which, in speaking of the teeth, uses the term "parallel" is this "*H*, one side of *A*, made either straight or curved, being cut into teeth pointed like a comb in the parallel portions." This is the material part of the sentence, and the question is, does that represent as one essential part of the invention that there shall be a parallelism in the teeth, and that that parallelism is a peculiar merit of the invention claimed by the patentee?

I do not for the present look at the drawing, but I dwell merely upon the words that I have read, and, reading these words, it appears to me that it would be impossible as a matter of construction to say that this patentee has claimed, or that he would claim, a parallelism of the teeth. It is quite true that he uses the word "parallel," but he explains in the clearest way that he used it in a popular and not in the mathematical sense. He is referring for his analogy or similitude to a comb, and he is taking notice that in every comb the teeth may be said to be parallel, and undoubtedly they are in a popular sense parallel, although probably, mathematically speaking, it would be difficult to find that the teeth of a comb were always, or generally, mathematically parallel. But he goes farther, and he takes notice that the teeth are to be pointed teeth, and they are to be pointed like the teeth of a comb, and he uses the expression "in the parallel portions." He uses these words at the same time that he declares that the teeth are to be pointed teeth, as the teeth of a comb are pointed. Now, when we remember that it would be impossible that where you had teeth *tapering to a point the teeth could at one and [428 the same time taper to a point and be mathematically parallel, it becomes perfectly obvious that what he is speaking of as the portions of the teeth which he calls "the parallel portions" are the upper portions of the teeth nearer the points, as distinguished from the part where the teeth spring in the first instance from the body of the comb, and where at the point of springing from the comb, they are naturally

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Clark v. Adie (No. 2).

H.L. (E.)

in a more angular position towards each other. It is for this purpose, and for this purpose only, that he is introducing the word "parallel." And then, when I turn with that explanation to the exhibit of that which is made by the appellant, the licensee, I find that his exhibit comes up exactly to the description which is contained in this specification. At the point where the teeth spring from the body, or solid part of the comb, the teeth are towards each other angular, but after they pass for about one third of the way up to the point, they become, in popular language and to the eye, parallel. Although it may possibly be that upon a strict mathematical examination some divergence from absolute parallelism might be detected, still, popularly speaking, and to the eye, they are perfectly parallel at the upper two-thirds of the teeth.

Well, my Lords, when I turn to the drawing, the drawing shows the teeth of the comb only so far as those teeth project beyond the cutting teeth which cover them, and, so far as they there project, that is to say, for a very short way from the points upwards, undoubtedly in the drawing, the points are represented as parallel to each other, and in the drawing they could not have been very well represented in any other way but as parallel. It is also true that it is very difficult to say whether in the drawing the teeth are meant to have points exactly acute, or square points. I should say they were rather intended to have square points, but it is not anywhere said in the specification that square points are a part of the invention, or that it is the desire of the patentee that the points should be square; on the contrary, he states in the specification that they are to be pointed like a comb, and a comb with square points is what probably no person ever yet saw.

So far, therefore, as regards the parallelism, I do not find 429] that *Mr. Adie has claimed in any way an exact and mathematical parallelism as a merit of his invention. He has used the term "parallel" no doubt, but he has used it merely in its popular sense, to describe by the similitude of a comb that these teeth are not to incline to each other at any angle used for the purpose of producing an inclination. The case, as regards the parallelism, will, I think, be judged of, and ought to be judged of, as I said before, as if this had been a proceeding against an infringer. It appears to me that it would be utterly impossible, assuming this to be a valid patent, and the proceedings to be taken against an alleged infringer for manufacturing an instrument such as I hold in my hand, that that infringer could be allowed to

say,—I have not infringed the patent, because by the application of a minute and mathematical test it will be found that there is not an exact and complete parallelism at the upper part of these teeth near the points.

The other question seems to me to be even more simple than this. The part of the specification which relates to the additional plate is that which it is necessary to consider. It is in these words: "The short end of the lever works in a slot in *B*, and by moving the handles *H H* to and from each other, lateral motion is given to the plates *A* and *B* and to the cutters, which cut both ways, clip all that comes between them, the thickness being regulated by the thickness of *A*" (that is the body of the comb) "or increased when desired by an extra comb *E* fixed on underneath," and, as I said, the appellant alleges that he has not fixed on any extra comb, and therefore has not worked under this patent. But, my Lords, that is at once answered by observing that what is here spoken of is in the alternative. There are two things which may be done—you may work the patent by making an instrument having a fixed degree of thickness, a fixed point at which the hair is to be cut, if that is the course you prefer. If that suits the business which you have in hand, you accomplish it by making the comb *A* of the thickness which you desire. But there is another course which you may take. You may desire to increase the length at which the hair is to be cut, and if you so desire you are then to put on an extra comb *E*. But the one alternative is a subject of the patent just as much as the other. It nowhere says *that the instrument must be an instrument which is [430 to be worked in either or both ways. It may suit the business of one man to work it without variation; it may suit the business of another man to work it with variation; and I ask, if it be the case that the person working it does not, to use the words of the specification, desire to increase the thickness, what is he to do? My Lords, he is clearly in that case to work without the extra comb in the method in which the appellant, the licensee, has worked. Therefore, again using the test of an action against an infringer, it would be impossible to imagine that an infringer, who in other respects had followed the manufacture pointed out in the specification, could exempt himself from liability by saying, I did not desire to increase the thickness, and I did not increase the thickness by the use of any extra comb.

Therefore, my Lords, upon the two points of difference I am obliged to find, without any kind of hesitation, that there is nothing whatever in what is suggested which con-

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stitutes that which will deliver the licensee from the charge of having worked under, and according to, the patent.

My Lords, a point was raised in the course of the argument, which occupied some time in the discussion—as to whether certain evidence ought or ought not to be admitted in this case. That evidence was of this kind: there had been previous patents granted to different persons for the purpose of making horse-clippers of various kinds, and the present patent being a patent for “improvements in the machinery for clipping horses,” it was said that those prior patents ought to be admitted in evidence for the purpose of showing the state of the manufacture before the present patent was granted, and that, they being so admitted, your Lordships would find in them descriptions of machines which were identical, or all but identical, as to the formation of the teeth, with that machine which the appellant, the licensee, was using. And then it was said, if that is so, the present patent claiming machinery which would be covered by former patents, would be invalid, and you ought to put upon this specification the construction, if it is possible so to do, which would deliver it from the peril of being held by reason of the prior specifications. My Lords, the Lords Justices heard the evidence upon the subject *de bene esse*, 431] *and ultimately they expressed an opinion that it could not be received for the purpose for which it was intended; but they said, as I read their judgment, that having looked at the evidence, that evidence would not affect the conclusion at which they arrived, and in point of fact the evidence appears, so far as I understand it, to be entered in the decree.

I do not think it will be necessary for your Lordships to lay down any precise rule as to the reception or the rejection of evidence in this case. It appears to me that it would be quite open in a case of this kind for a person in the position of a licensee, or for a person in the position of a patentee, to refer, in launching his case, to the state of manufacture up to and at the time when the patent was granted. He might give evidence of that in any usual way—in any way suitable for the purpose. I should myself doubt whether the mere reproduction of prior specifications from the records of the Patent Office would be the best way of showing what was the state of the manufacture at the time, for it might well be that there were in the Patent Office specifications which had been allowed to slumber, which had been utterly unused, which had never been adopted or taken into the course of manufacture, and which practically

had exercised no influence whatever upon the manufacture of the particular article. But my Lords, I am not prepared to say that in some way, and for some purpose, these specifications might not have been put into the hands of those acquainted with the trade, and questions have been asked upon them; nor am I prepared to say that they might not for some purposes have been admissible in evidence, and if admissible in evidence for some purpose, of course they would become evidence, whatever the weight and effect of that evidence might be in the cause.

My Lords, it is sufficient for this purpose to say that, having attentively considered the parts of those specifications which it was suggested to your Lordships had a bearing upon this case, I have arrived at the conclusion that they are not of any weight to control what appears to me to be the necessary and legitimate construction of the particular specification which your Lordships have to consider. It was said that if the specification before the House was ambiguous or doubtful, a construction might be put *upon [432 it which would save this specification from invalidity by reason of prior publication. My Lords, it is unnecessary to consider that argument, for the specification appears to me not to be doubtful or ambiguous. What the consequence might be in any litigation with an outsider, with one of the public, it is not for your Lordships now to consider; but having to construe the specification upon the two particular points which have been mentioned, I am bound to say that I arrive without hesitation at the conclusion that there is nothing in the specification which rests the merit of the invention upon a parallelism of the teeth of the comb, and there is nothing on the proper construction of the specification which enables either a licensee or an infringer to say that provided he does not use the extra comb which is spoken of, he does not use and he does not infringe the patent.

My Lords, upon those grounds I submit to your Lordships, and move your Lordships, that the appeal should be dismissed with costs.

LORD HATHERLEY had come to the same conclusion, without any hesitation, for it appeared to him, when the two machines were examined, that the appellant in the present case was really driven to rest his case upon narrowing the effect of Adie's patent to such an extent as to enable him to say in substance that he had not worked under it. The licensee could not deny the validity of the patent, but he might show that what he had done did not come within its

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terms. With regard to the parallelism, his Lordship read the patent as the Lord Chancellor had read it. And he read in the same manner that part of the patent which related to the additional thickness of plate required to regulate the length of the hair to be cut. His Lordship continued :

When we come to the claim of the patentee, supposing him to be placed in the position of having to satisfy a court that he has not claimed too much, when it comes to be proved that other patents have been taken out which might more or less cover some of those inventions which he has claimed, then he says: "I would have it understood that I do not confine myself to the precise details shown and described." The argument here has endeavored to confine him very strictly indeed to that claim, but he says they 433] **"may be varied."* He says, "What I do claim is the application of a number of small shears clipping hair to any required length"—that is one thing—"the protection afforded by means of the comb points in front"—that is the next thing—"and the guidance given to the hair by means of said comb points." It is perfectly impossible, as it seems to me, in a common sense construction of these words, to say that he has limited his claim to the parallel portions of the comb, and to the placing of an additional block in order to vary the thickness of the hair which might have to be cut. As was observed by one of your Lordships, certainly, whatever may be thought of the length to which *Foxwell v. Bostock* ⁽¹⁾ has gone, it would have been a singular argument indeed for a patentee to use, and it is one as to which it is strange that it should never have occurred to anybody to use it, if it could have been used, to say: The mode in which a patent of this description is now construed by me is this: when you find it is a construction for an improvement of the machine, then look to all the other machines which have been constructed for this purpose,—take out of the apparent largeness and generality of this claim all those inventions and improvements which have been anticipated by the other letters patent which I produce and show in evidence—hold, on my behalf, that I must have known all these prior inventions, and that therefore it is most preposterous to suppose that I can be claiming them,—I ask the court therefore to cast out of its purview all that had previously been invented, and to leave me in possession of the residuum as that on which I can be held to insist against an infringer. Whatever may be the length to which the principle on which *Foxwell v. Bostock* ⁽¹⁾ was decided has been carried, it seems

⁽¹⁾ 12 W. R., 723; 4 De G. J. & S., 298.

to me that it would be a very extraordinary construction of letters patent to say that the court would take care to steer a patentee clear of all those rocks which are ahead of patentees in consequence of previous inventions, by the simple assumption that it was impossible that he could mean to claim those things which had been already invented, and therefore you must reduce his claim to a minimum as long as you find anything to reduce it to—you must reduce it to those things which had never been invented before, and so hold, on the construction of the present *patent, that [434 you have reduced it to the parallelism and the substitution of the additional blocks for the purpose of cutting hair at different lengths. It appears to me to be perfectly plain that we must construe these letters patent in a simple way, as the patentee has chosen to explain them for himself in framing his claim. He has told you what he claims, namely, those things which I have read. It seems to me that you cannot confine the claim to that which the licensee, because it suits his purpose, wishes to confine it to, any more than you could have done that in the case of an infringer if this had been an ordinary action for infringement.

I will say little or nothing about the introduction of the evidence. There are several points of view, no doubt, in which the production of those patents as evidence may possibly have been correct, because this being a patent for an improvement, I take it that it was open to both the plaintiff and the defendant in an action of this kind to lead the court up to what the improvements were, by putting the court in possession of what the previous inventions were, upon which this was said to be an improvement. I have no doubt that that would be one legitimate use of the evidence, as it would also be a legitimate use of it to show, by other letters patent or the like, what the exact terms of art were which were employed in describing the machine in question. The evidence having been admitted for a legitimate purpose, it would be perfectly legitimate to let it remain on the record, but as regards the question whether that evidence could be used in the manner in which it has been pressed upon us in argument, namely, as showing, step by step, that first one portion of what this patentee seems to me to have claimed, is to be rejected because it was invented by somebody else before him, and then that another portion of what he claims is to be rejected because it was invented by another person before him, and that therefore it is legitimate to use such evidence in construing language, which is in itself plain, for the pur-

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pose of showing that it could not possibly have that which is its ordinary and primary meaning, because if it had that effect it would leave the patentee subject to the destruction of his patent: I apprehend, my Lords, that it would be very doubtful indeed whether it is evidence which could be pressed as being useful for such a purpose.

435] *But it is not necessary to go farther upon that point, because I hold that from the language of this patent it is impossible to construe it as confined to the two points referred to by the appellant, and it is impossible so to construe it as not to leave a portion therein which strikes Mr. Clark as the licensee, and makes him liable for the license duty he has agreed to pay in respect to that portion under which he has worked, he being compelled by the circumstances under which he took the license, to close his mouth as to any alleged deficiencies in the patent. It is not for him to say that any part of the patent is void; he cannot do that. If the patent must be taken to be valid and effectual against him, I think he has clearly manufactured a machine within the terms of that patent in respect of which he agreed to take the license and agreed to pay a royalty, which royalty, therefore, became payable by him upon that machine.

LORD BLACKBURN: My Lords, I am entirely of the same opinion.

The position of a licensee who under a license is working a patent right, for which another has got a patent, is very analogous indeed to the position of a tenant of lands who has taken a lease of those lands from another. So long as the lease remains in force, and the tenant has not been evicted from the land, he is estopped from denying that his lessor had a title to that land. When the lease is at an end, the man who was formerly the tenant, but has now ceased to be so, may show that it was altogether a mistake to have taken that lease, and that the land really belonged to him; but during the continuance of the lease he cannot show anything of the sort; it must be taken as against him that the lessor had a title to the land. Now a person who takes a license from a patentee, is bound upon the same principle and in exactly the same way. The two cases are very closely analogous; in analogies there are always apt to be some differences, but I know of none in this. The tenant under a lease is at liberty to show that the parcel of land which he and the lessor are disputing about was never comprised in the lease at all; he may show that he took the lease of Blackacre from the person who granted him the lease,

and *that the spot of land then in question, Greenacre, [436 we will suppose, is a piece of land which was never included in the lease at all, and which belongs to him (the tenant) under some other right. So may a licensee under a patent show that, although he accepted the license, and worked the patent, and the patentee could never, therefore, so long as that license was in existence, bring an action against him as an infringer, yet the particular thing which he has done was not a part of what was included in the patent at all, but that he has done it as one of the general public might have done it, and therefore is not bound to pay royalty for it. If he has used that which is in the patent, and which his license authorizes him to use without the patentee being able to claim against him for infringement, because the license would include it, then, like a tenant under a lease, he is estopped from denying the patentee's right, and must pay royalty. Although a stranger might show that the patent was as bad as any one could wish it to be, the licensee must not show that.

Taking that to be the rule, and I think the analogy between the two is perfect, the question in a suit in which a patentee is claiming royalty from his licensee is, whether what the licensee has done is included in the patent which the patentee or licensor had, and which he gave him license to use? That must depend entirely upon the construction of the specification. If upon the true construction of the specification it is included, no matter whether it is good or bad, the licensee must pay. If, upon the true construction of the specification it is not included, there is no reason why the licensee should pay.

My Lords, that brings us to what is the point in the present case. In construing the specification, we must construe it like all written documents, taking the words and seeing what is the meaning of those words when applied to the subject-matter; and in the case of a specification which is addressed not to the world at large but to a particular class, for instance, skilled mechanics, possessing a certain amount of knowledge, it is material for the tribunal to put itself in the position of such a class, namely, skilled mechanics, and to see what the words of the specification mean when applied to such a subject as skilled mechanics would *know, and, as the tribunal has now, by the [437 admission of evidence or otherwise, put itself in a position to understand, and then to say what the words of the specification mean when applied to such a subject-matter. For that purpose I am not at all prepared to say that the

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other patents and specifications would not in the present case be admissible evidence, as having more or less weight (in this case I think they would have but little weight) or value as putting the courts in the position of knowing what was the subject-matter they were dealing with, and what the words meant, and whether they had a different construction from what they would have if construed without that knowledge. But when it is attempted, as it was certainly in the argument before us, I do not know whether the Vice-Chancellor went so far as that, to say that inasmuch as these specifications show, or are alleged to show, that matters which, upon a fair construction of the specification are claimed by the patentee, were old at the time that the patent was taken out, and were generally known to be old, therefore the specification must be so construed as not to include them; that seems to me to be both contrary, as far as I know, to the course of decision and contrary to principle. As my noble and learned friend opposite (Lord Hatherley) has just observed, it would afford a very simple recipe for saying that no patent should ever be upset upon the ground of want of novelty. If, when you say you can show that a thing was old at the time the patent was granted, you are to construe the specification as not intending to claim that, because such a claim would be suicidal and foolish, it would be a recipe for saying you shall never upset a patent at all for want of novelty. I do not think, my Lords, that that could possibly be done.

Now, my Lords, with these general remarks, I come to the present case. [His Lordship made a statement of the facts, and said:] It seems to me, my Lords, that Clark has in fact used the patent whilst he had a license to use it, and that, having used it in that way, and there having been nothing analogous to an eviction, or other mode of terminating the license, he is as much bound to pay the royalty rent as a tenant, in the analogous case, would have been bound to pay the rent for the land.

438] *LORD GORDON concurred. As to the argument for the absolute exclusion of evidence as to prior patents, his Lordship said:

I think it is of the more consequence in this case that your Lordships should not come to a decided opinion with reference to the exclusion of the kind of evidence which was tendered on this trial, first, because this is a case which has reference to "improvements" on means and machinery for doing a particular sort of work, as to which there is no doubt that various machines have been described and pro-

tected under previous patents; and, secondly, because in the present case, while it is the rule that a licensee is not entitled to object to the validity of the patent which is the subject of the license, still it does appear to me that there have been views expressed which might permit, and fully justify, the reception of the evidence which has been rejected. I refer to the opinion that the licensee may show that what he has done, and in respect of which a royalty is claimed from him, is something that is really not within the limits of the patent. That makes it necessary that there should be a full opportunity of giving evidence. There should not be a rule of absolute exclusion of such evidence. There should on certain occasions be a full opportunity of giving it. Some of these cases might come before the common law courts, where the judge does not form and declare his own opinion upon the evidence itself, but states his view of its competency, leaving to the jury the decision of its value in point of fact. Subject to these observations, I concur in what has been proposed as to the disposal of this case.

Order appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 30th April, 1877.

Solicitor for appellant: *Alfred Hendricks.*

Solicitor for respondent: *J. Henry Johnson.*

[2 Appeal Cases, 439.]

H.L. (E.), June 5, 1877.

[HOUSE OF LORDS.]

***THOMAS HUGHES, Appellant; and THE DIRECTORS, [439 &c., OF THE METROPOLITAN RAILWAY COMPANY, Respondents (').**

Notice to Repair—Suspension of Effect of—Equitable Relief against Forfeiture.

Where a notice to repair has been given, and the lessee makes an offer to sell his interest in the premises, and a negotiation takes place on that offer, the effect of that offer and the negotiation is to suspend the notice till the negotiation has been terminated, from which event alone the date of the notice can properly be calculated. Equity will relieve against an ejection founded on the original notice.

A notice to repair, within six months, houses held on lease by the Metropolitan Railway Company, was given on the 22d of October, 1874, to expire on the 22d of April, 1875. It was answered by a letter of the 28th of November, suggesting that the lessors might like to purchase the premises. The lessors' solicitors, by letter of the 1st of December, asked the price demanded, and were told, by letter on the 30th of December, that it was £3,000. The lessors' solicitors on the 31st of December, 1874, wrote to say that, considering the condition of the premises, "the price is out

(¹) Affirming 16 Eng. Rep., 466.

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of all reason. We must therefore request you to reconsider the question of price, having regard to the previous observations, and to the fact that the company have already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you." No farther communication on this subject took place till the 19th of April, 1875, when the agent for the company wrote to say that as "the negotiations had not resulted in a sale" the company would take in hand the repairs. On the 20th of April the solicitors for the appellant wrote, declaring that "the negotiations" had been broken off in December last, and that there had been ample time since then to complete the repairs. On the 22d of April the notice expired, and on the 28th the ejectment was served. After verdict for the plaintiff and judgment in the court below:

Held, that the company was entitled in equity to be relieved against the forfeiture, for that the letters at the end of November and at the beginning of December had the effect of suspending the notice, and that the suspension did not come to an end till the 31st of December, till which time the operation of the notice was waived, so that no part of that time could be counted against the tenant in a six months' notice to repair.

IN this case an action of ejectment had been brought to recover from the respondents possession of certain houses, originally demised by a lease, dated the 15th of June, 1787, 440] executed by the *then Lord Southampton to Mr. James Haygarth. The tenancy was for ninety-nine years, to commence as from the 29th of September, 1786. The appellant was the freehold reversioner of the property, and the respondents were the assignees of the lease. There was the ordinary covenant "as often as need shall require during the term hereby granted," to repair,—and the lessor "and the person or persons for the time being entitled to the freehold or inheritance of the said premises, and his or their stewards, surveyors, and workmen, twice in every year or oftener" were to be entitled to enter and view the state and condition of the premises, and to give or leave notice in writing on the demised premises, for the amendment of all defects, and want of reparation. And the lessee covenanted within six months after such notice to repair.

On the 22d of October, 1874, the appellant's solicitors left with the respondents a formal written notice to repair "within the space of six calendar months from the date hereof." On the 28th of November, 1874, the agents of the respondents wrote acknowledging the receipt of the notice, and promising that "the repairs required by the covenants of the leases shall be forthwith commenced." The letter went on thus: "It occurs to us that the freeholder may be desirous of obtaining possession of the company's interest, which, as you know, is but short, and so we propose to defer commencing the repairs until we hear from you as to the probability of an arrangement such as we suggest." On the 1st of December, 1874, the appellant's agents wrote that if the respondents "are willing to sell these houses, and give immediate pos-

session, our client will, on hearing from you the price, consider whether it is worth his while to acquire the company's interest or not."

On the 30th of December, 1874, the respondents' agents offered a surrender of the whole of the leases in consideration of a payment of £3,000," and asked for an answer at "early convenience."

On the next day, the 31st of December, the appellant's solicitors wrote to say that "having regard to the state of repair in which the houses now are, and to the large expenditure which will be required to put them in a proper condition, the whole of which the company is liable to bear under the covenants in the leases, we think the price asked for is out of all reason. We must therefore request you to reconsider the question of price, having *regard to our previous [44] observations, and to the fact that the company have already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you."

On the 6th of January, 1875, the appellant's agents wrote to request payment of ground rent for the various houses which had been the subject of the correspondence, and to ask "the address of Colonel Penley, to whom you pay a rent of £100 a year" in respect of one of the houses. As to this house the answer, dated the 7th of January, 1875, was that the rent was paid to Colonel Penley's solicitors, Messrs. Remnant & Penley, of Lincoln's Inn Fields.

No other communication passed between the parties till the 19th of April, 1875. On that day Mr. Bell, the secretary of the respondents, wrote from the company's offices to the appellant's solicitors, "As the negotiations with your client have not resulted in a sale of the company's interest to him, and the weather is now favorable for the performance of the necessary works, our repairing staff will immediately take in hand the requisite repairs to the above premises."

On the 20th of April, 1875, the appellant's solicitors wrote to Messrs. Remnant & Penley, "with reference to Mr. Bell's letter to you we beg to say that the negotiations with Mr. Hughes were broken off in December last, and there has been ample time since then to have completed the repairs in accordance with the terms of the notice."

On the 22d of April, 1875, the notice expired. On the 28th of April (the premises being alleged to be still out of repair) the writ of ejectment was served. After action brought the repairs were begun, and were completed somewhere in June.

The ejectment was tried before Mr. Justice Denman and a special jury on the 10th of November, 1875, when a verdict was found for the plaintiff (the appellant), and judgment was entered thereon.

On the 23d of November a motion was made by the defendants (the respondents), to stay execution on equitable grounds. Lord Coleridge, in delivering the judgment of the court (⁽¹⁾), refusing the motion, referred to an affidavit made 442] by the secretary of the company, *in which it was stated that the respondents presumed that the repairs need not be commenced until farther notice from the plaintiff's solicitors, and that the six months would not include any time during which the negotiations were pending, and said, "we are of opinion, however, that even if the defendants did assume what is here stated, they were not led to do so by anything said or done by the plaintiff or his solicitors. It appears to us that the effect of the correspondence was this: first, to give to the company a reasonable time to make a fresh offer; and, secondly (if the negotiations were not resumed), to give the company a reasonable time (but not necessarily six months), from the 31st of December, to do the repairs required." Judgment was therefore ordered not to be stayed. The defendants then gave notice of an application to the Court of Appeal that the order of the Court of Common Pleas might be reversed and all proceedings stayed, on such terms as the court might think fit. The Court of Appeal granted this application; Lord Justice James intimating his opinion that "the lessor lulled the defendants to sleep, intentionally lulled them to sleep, until it was too late for them to do the repairs." The order of the Court of Common Pleas was therefore reversed, and execution was ordered to be stayed, with costs (⁽²⁾). This appeal was then brought.

Mr. *Southgate*, Q.C., and Mr. *C. Bowen*, for the appellant: There was no pretence for saying that there had been a waiver of the notice to repair, nor had anything been done by the appellant to suspend its operation. There had not been any request by the respondents that its operative effect should be suspended, nor any concession of suspension by the appellant. On the contrary, in the letter of the 31st of December, when the company's offer to sell for £3,000 was rejected, the company's agent had his attention specially called to "the fact that the company have already been served with notice to put the premises in repair." Nothing, therefore, which the appellant had done afforded any ground

(¹) Lord Coleridge, Mr. Justice Brett, and Mr. Justice Lindley,

(²) Law Rep., 1 C. P. D., 120, where all the correspondence is fully set out.

for this application for equitable relief. In *Gregory v. Wilson* ⁽¹⁾ Vice-Chancellor Turner said that equity would not relieve against the *legal consequences of a breach [443 of covenant, and that a notice to quit for a breach of covenant was in fact a warning to be more vigilant in the performance of the covenants. So in *Nokes v. Gibbon* ⁽²⁾ Vice-Chancellor Kindersley, while adopting that rule, said that where one covenant had been clearly broken, equity would not interfere to stay an ejectment. In *Bargent v. Thomson* ⁽³⁾ the court only interfered because, out of twenty-two items twenty had been duly proceeded with and fourteen actually completed, and any delay which had occurred was attributable to the weather. Here nothing of that sort could be alleged, and the delay was altogether the delay occasioned by the utter neglect of the respondents to do anything in the matter.

Mr. *E. Kay*, Q.C., and Mr. *W. G. Harrison*, Q.C., for the respondents, were not called on.

THE LORD CHANCELLOR (Lord Cairns): My Lords, the decree of the Court of Appeal which is brought before your Lordships in this case is one which has the support of all the five judges who constituted the Court of Appeal at the time. One of the learned judges, Mr. Baron Cleasby, no doubt assented to the decision with some hesitation, but it was a unanimous decision of the court.

My Lords, I own that the able argument which your Lordships have heard has raised no doubt whatever in my mind as to the propriety of that decision. I say the propriety of the decision, although at the same time I am not able, as to one part of the case, to take the view which one, at least, of the learned judges who pronounced the decision, appears to have taken. Lord Justice James, in the observations which he made, is reported to have said this: "I am of opinion" "from all this correspondence, that the lessor" (that is the present appellant) "lulled the defendants to sleep, intentionally lulled them to sleep, until it was too late for them to do the repairs, that he intentionally induced them to wait till the six months were nearly over, and then sought to enforce the forfeiture." That not merely states a case which would entitle the Court of Equity to give relief, but states a case as against the *appellant which [444 imputes to him a serious offence in point of morals. My Lords, I am bound to say, and I think the appellant is entitled that I should at once say, that I see no evidence what-

⁽¹⁾ 9 Hare, 683; 22 L. J. (Ch). 159.

⁽²⁾ 3 Drew., 681; 26 L. J. (Ch.), 433.

⁽³⁾ 4 Giff., 473.

ever for fixing upon the appellant the stain which these observations would fix upon him. I am unable to see that there is any evidence in this case, that there was any intention on the part of the appellant, to lull the defendants to sleep, in order that he might wait until the six months were nearly over, and then take advantage of a forfeiture. For reasons which I am about to state, I am of opinion that the appellant cannot take advantage of a forfeiture, but in my opinion there was no intention whatever on his part to practise any wrong upon the respondents. I think that both parties, almost unintentionally—I have very little doubt, without reflection—placed themselves in a position in which the one, the appellant, as against the other, the respondents, was not entitled to enforce the forfeiture which he might have enforced at law; but that arose, not from any intention on his part to do a wrong to the respondents, but merely from circumstances which had occurred, and to which I am now about to refer.

My Lords, the appellant was the landlord of certain premises in the Euston Road, the lease of which, an old and a long lease, was vested in the respondents. There were in the lease covenants to repair, and to repair after notice. Notice had been given and served upon the respondents by the appellant on the 22d of October, 1874; it was a notice to repair the premises within six months; that six months would therefore expire on the 22d of April, 1875. Nothing was done by the respondents between the 22d of October and the 28th of November. On the 28th of November the agents of the respondents wrote to the solicitors of the appellant a very important letter. There can be no doubt that the letter refers to the premises in question, although it refers also to other premises. It states that the notice to repair had been received, and that the repairs required by the covenants of the lease “shall be forthwith commenced,” but then it adds: “It occurs to us that the freeholder may be desirous of obtaining possession of the company’s interest, which, as you know, is but a short one, and so we propose to defer commencing the repairs until we hear from you as to the probability of an arrangement 445] *such as we suggest.” Now, if these two parties, the appellant and the respondents, were really minded to treat for the purchase of this lease, of course it was to the interest of both parties that the doing of these repairs should be suspended, and that the property should be bought as it then stood, because it might be desired to apply it to purposes for which the repairs would be useless—and I read

this as a definite intimation on the part of the respondents that they would not proceed to execute the repairs (although they stated their readiness to commence them forthwith), if they found that there was a probability of an arrangement to purchase being come to.

The appellant, when he received that letter, might have said, I have no intention of becoming a purchaser; or he might have said, I may become a purchaser; but if a negotiation is to be commenced you must understand that it is to be without prejudice to my notice to repair; you must go on and make the repairs as if there was no negotiation; or he might have said simply, I will adopt what you propose and enter upon a negotiation, saying nothing farther. That third course is the course which he took, and it is a course which, as it seems to me, when taken, carried with it the intimation that he was satisfied with the footing upon which the matter was put by the letter which he was answering. This is what his solicitors say in their letter of the 1st of December: "If the company are the owners of" certain other houses, "and are willing to sell them all" (that is all the houses), "and give immediate possession, our client will, on learning the price, consider whether it is worth while to acquire the company's interest or not. In mentioning the price, please to give us particulars of the tenancies and rents paid to the company."

Now, that being a letter which, as it appears to me, acceded to the suggestion that the repairs were to be deferred until it was ascertained whether an agreement could be made for the purchase, on the 4th of December that letter of the 1st was replied to, and replied to in this way: "We are in receipt of yours of the 1st instant. The particulars and terms asked for shall be sent in the course of a few days." Again, on the 30th of December, the agents of the respondents write to the solicitors of the appellant: "We send you herewith a statement of the company's *receipts [446 and payments in respect of the houses in Euston Road as requested by you. The company will agree to surrender the whole of the leases in consideration of a payment of £3,000. We shall be glad to hear from you at your early convenience." That is followed by the particulars of the Metropolitan Railway Company's interest in the houses in Euston Road, the property of Mr. Hughes. There is a somewhat lengthy schedule, and it is obvious that the preparation of that schedule was a work which would easily account for the lapse of time between the 4th and the 30th of December. It was a schedule which was required by the

appellant. Time was required to prepare it, and your Lordships come therefore to the 30th of December with clear proof that no time whatever had been lost between the 28th of November and that day.

The offer, then, standing upon the letter of the 30th of December, that letter is replied to by the solicitors of the appellant in these words: "We have duly received your letter of yesterday's date inclosing a statement of the company's receipts and payments in respect of the houses in Euston Road, and at the same time intimating that the company will agree to surrender the whole of the leases in consideration of the payment of £3,000. Having regard, however, to the state of repair in which the houses now are, and to the large expenditure which will be required to put them in a proper condition, the whole of which the company are liable to bear under the covenants in the leases, we think the price asked for is out of all reason. We must therefore request you to reconsider the question of price, having regard to the previous observations, and to the fact that the company have already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you."

My Lords, I think it unnecessary to go beyond that letter. That is a letter which, a price of £3,000 having been proposed, repudiates that price, refuses to give it, and asks for a modified proposal. No modified proposal, in point of fact, was made. But I will put the matter in the most favorable way for the appellant. I will assume that in place of asking for a modified proposal that had been a letter which had at once terminated the negotiation. No farther proposal having been made in substance the negotiation *then determined. I will assume that the letter, upon the face of it, had terminated the negotiation, and now I ask your Lordships to consider what would be the consequence. There had been a notice in October to repair in six months. The effect of the letter of November, as it seems to me, was to propose to the appellant, and the farther letter of the appellant had the effect of an assent by the appellant, to suspend the operation of that notice in order to enter upon a negotiation for the purchase and sale of the lease. That negotiation was entered upon, and, as I have assumed, came to an end on the 31st of December. My Lords, it appears to me that in the eye of a court of equity, or in the eye of any court dealing upon principles of equity, it must be taken that all the time which had elapsed between the giving of the notice in October and the letter of the 28th of November

was waived as a part of the six months during which the repairs were to be executed, and that all the time from the 28th of November until the conclusion of the negotiation, which I have assumed to be on the 31st of December, was also waived—that it was impossible that any part of that time should afterwards be counted as against the tenant in a six months' notice to repair. The result would be, that it would be on the 31st of December, as the first time, that time would begin to run, for the purpose of repairs, as against the tenant.

Then occurs the question, what time from the 31st of December would be given? My Lords, what a court of equity would have done if it had found that the tenant after the 31st of December had taken no steps to make the repairs, and that a period of six months had run from the 31st of December without any repairs having been made, it is not necessary here to consider. In point of fact the repairs were made within six months, from the 31st of December; and, my Lords, I cannot but think that the lease having prescribed a period of six months, as that which in the eyes of the contracting parties was a reasonable period, within which to make such repairs as those, a court of equity would hold, and would be bound to hold, that the negotiation having been broken off on the 31st of December, the repairs were in this case executed within that which according to the view of the parties was a reasonable time for the execution of such repairs.

*My Lords, it is upon those grounds that I am of [448 opinion that the decision of the court below is correct. It was not argued at your Lordships' bar, and it could not be argued, that there was any right of a court of equity, or any practice of a court of equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. My Lords, I repeat that I attribute to the appellant

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no intention here to take advantage of, to lay a trap for, or to lull into false security those with whom he was dealing; but it appears to me that both parties by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months dating from the month of October should afterwards be measured out as against the respondents as the period during which the repairs must be executed.

I therefore propose to your Lordships that the decree which is appealed against should be affirmed, and the present appeal dismissed with costs.

LORD O'HAGAN: My Lords, I am of the same opinion. Your Lordships have no power to relieve against the effect of a forfeiture such as was legally established by the verdict of the jury in this case, merely on the ground that it has pressed hardly on the defendants. They entered into a covenant: and if they have failed to fulfil their undertaking they must abide the results, however onerous, unless the circumstances excuse their default in the view of a court of equity. But if they acted, or failed to act, through a mistake induced by the conduct of the plaintiff: if they were misled by it into the belief that his strict legal right was abandoned or suspended for the time, he cannot be allowed to take advantage of the forfeiture which was so accomplished.

I am bound to say, with my noble and learned friend on the woolsack, that I see no evidence to impeach the plaintiff of *mala fides* or misrepresentation or wilful lulling of the defendants into a disregard of their legal duty or a compromise of their legal rights. But this does not affect the question. If there was real misleading and *bona fide* mistake, it does not matter that the plaintiff acted honestly and without indirect purpose of any kind. The facts of the misleading and mistake are enough to prevent the forfeiture, although they had their origin in no corrupt intention. Now, we have it sworn, on behalf of the defendants, that they were put off their guard and induced to postpone the making of the needful repairs, within the appointed time, by the negotiation which was pending. The letters and the oral proof put that negotiation beyond controversy. It continued, at least, from the 28th of November until the 31st of December: and the learned counsel failed altogether in contending that, during that period, at all events, the operation of the notice was not suspended. Both parties contemplated, as the issue of it, a sale of the premises: and, of necessity, the question of repairs was put out of considera-

tion. No doubt they might have agreed that the negotiation should be without prejudice to the notice ; but they did nothing of the kind. It seems to me quite clear that time working forfeiture did not run during that negotiation : and I incline to agree with an observation of my noble and learned friend opposite (Lord Selborne), in the course of the discussion that the period which had elapsed before the beginning of it, after the notice was given, cannot be taken into account and pieced on to that which elapsed after it had ended, to make up the six months and complete the default. But it is not necessary to pronounce on this point with a view to our decision.

Well, so the negotiation continued until the 31st of December. Did it then conclude? Quite the contrary. The plaintiff expressly dealt with it as still subsisting ; and, having refused the offer already made to him, invited another. To his invitation he *got no reply, and he [450 proceeded to act upon his notice. I quite concur with Lord Justice Mellish that his proper course would have been to inform the defendants, within a reasonable time, that failing to make a new proposal they should understand the negotiation to have been concluded and the parties relegated to their legal rights. This would have been a reasonable and equitable course : but it was not taken, and the plaintiff must bear the consequences. I think that the judgment should be affirmed, and the appeal dismissed with costs.

LORD SELBORNE: My Lords, I am of the same opinion, and for the same reasons. I agree that there is nothing at all requiring your Lordships to throw any doubt upon the good faith of the plaintiff in this case.

In reality I think that the difference between the Court of Common Pleas and the Court of Appeal comes to a short and a very simple point. Lord Coleridge in delivering the judgment of the Court of Common Pleas says (1) this: "It appears to us that the effect of the correspondence was this, namely, first to give to the Metropolitan Railway Company a reasonable time to make a fresh offer ; and, secondly (if the negotiations were not resumed), to give the company a reasonable time (but not necessarily six months), from the 31st of December to do the repairs required." The real point in difference is, what was a reasonable time under the circumstances of the case? As to the effect of the correspondence down to the 31st of December, and, I may add, for some not definite time afterwards, there really is an agreement of both courts that the first two and a half

(1) 1 C. P. Div., at p. 129.

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months of the notice or thereabouts were waived; and I must say that looking at the terms of the correspondence, I can see no reasonable room for doubt about it, because the first letter of the 28th of November, 1874, says as clearly as possible these two things: If you require it, the repairs which we have received notice to make shall be forthwith commenced, but we have an alternative proposition to make, and, if you entertain that alternative proposition, then we propose to defer the commencing of the repairs until we hear from you that we shall commence them: that is the effect of it; and the accession *to that in the subsequent correspondence by the plaintiff is as plain as if he had said in terms; I do not require you forthwith to commence the repairs; I am willing to enter into the treaty that you propose; it is not improbable that an arrangement may be made, and therefore I agree that the commencement of the repairs may be deferred as you suggest.

That goes on until the 31st of December, and then, although the notice is referred to, it is manifestly not referred to as putting an end to that understanding at that exact period of time; it is referred to as an element of price, to be considered in the new offer which is invited. I really do not think it necessary to inquire whether the respondents could reasonably be heard to say that they were at liberty to do nothing for four months afterwards, expecting some farther notice from the plaintiff. I confess that my impression is not so; but taking it not to be so, what is the result? Why this, you have got the affidavit upon which the present application for the equitable jurisdiction of the Common Pleas Division is made—the affidavit of Mr. Bell—who positively states that “no objection having been raised by the plaintiff’s solicitors to the repairs standing over during the negotiations, the company presumed the repairs need not be commenced until farther notice from the plaintiff’s solicitors.” I do not agree to that—at all events, I think that that is a ground which need not be taken as the foundation of the judgment, and could not safely be taken by the company. But he goes on, “and that the six months within which the repairs were to be done would not include any time during which the negotiations were pending.” Then he says in the next paragraph that the repairs were actually “finished by the middle of June, 1875, being within six months from the earliest date at which the negotiations for a sale of the company’s interest to the plaintiff might be taken to have been broken off,” which manifestly must mean the 31st of December, or a few days afterwards.

Now the question is, whether the conduct of the plaintiff in the correspondence justified and naturally led to that impression on the part of the company? In my opinion it clearly did; and if it did, what is the consequence? I think the consequence is that which Lord Justice Baggallay derives from it. He says that the circumstances "were of a character to lead the company to *consider that the [452 notice to repair was at any rate suspended for some period of time," at least until the 31st of December. What is the meaning, in the view of a court of equity, of suspending a notice to repair? Manifestly that during that time the notice is not to be operative. What is the reasonable result of that in the circumstances of this case? Why, when the notice is to become operative, the same will be a reasonable time for the execution of the repairs which would have been a reasonable time if the notice had been given at that period, that is, six months from at least the 31st of December, 1874.

Therefore, my Lords, upon these grounds, I entirely agree that the judgment of the Court of Appeal is right.

LORD BLACKBURN: My Lords, I also entirely agree in the judgment, but I think it right to say that I likewise completely agree in the opinion that there is no ground for supposing that the plaintiff or the plaintiff's advisers, who were acting for him in writing the letters of November and December, intended, by acting as they did, to bring the defendants into a scrape and to take advantage of it. I think Lord Justice James misapprehended the facts when he said so, and I think it is right to say that I consider that that was not the case. But I quite agree that notwithstanding that, there is equity to relieve the defendants, and instead of putting it in my own words, I will read those which are given to Lord Justice Mellish, adopting them as my own because I think they exactly express what I believe to be the right law⁽¹⁾: "But even if the plaintiff himself did not intend to abandon the notice, yet if his conduct was such as to put the defendants off their guard, and to lead them to believe that the six months' notice would not be insisted on, there is a ground for giving relief in equity. The result of waiver is different, for the notice is gone at law, whereas courts of equity, though they relieve against the forfeiture, will still compel the lessee to put the house into substantial repair, and will give the landlord all that he is really entitled to, only preventing him from enforcing a forfeiture that would be inequitable."

(¹) 1 C. P. Div., at p. 135.

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My Lords, I apprehend that that correctly states the rule 453] of *equity and justice, and that the only remaining question is, whether in the present case there has been such a misleading as is there described? I think not at all an intentional misleading, but such an inducing the defendants to think that the actual six months would not be insisted upon, and farther, what period that delay in insisting upon the actual six months would give them.

I shall not repeat what has been said by the noble and learned Lords who have spoken before me as to the effect of the correspondence. I think it quite clear that there was an inducing the defendants to believe that they need not repair during the period up to the 31st of December, at all events, and that it was not until the 31st of December, or perhaps a short time afterwards, when the time for making a fresh offer had elapsed, whenever that might be, that it could be considered that they were not under an apprehension, induced by the plaintiff's conduct, that they need not make the repairs at that time. Then comes the question, which after all is the question upon which the Court of Appeal below has differed from the Court of Common Pleas, whether the period within which the repairs ought to have been executed after the negotiation went off (which I will assume to have been on the 31st of December) was a reasonable time, in the sense of such a time as a jury, on the evidence, might say was sufficient to make the repairs of the houses, or whether it was the conventional time of six months provided for in the lease? If it were a reasonable time within which the repairs might have been made, then the fact that the repairs were actually commenced in April and were finished by the middle of June—that is to say, in two months—would show that the time between the 31st of December and the 24th of April, when the notice had run out by efflux of time, which was three months, would have been sufficient. If in two months the repairs were actually done, no one would dispute that three months would be a reasonable time to do them in. But then, is it correct to say that we are to take a reasonable time, in the sense of an uncertain time, according to the evidence, when we have a conventional time, namely, six months, stipulated for? I think the very object for which the stipulated time of six months was named, was to prevent that uncertainty in say- 454] ing what would be a reasonable time, and to *enable one of the parties to know that he had got six months to do the repairs in, even if that was more than was needed, and to enable the other to know that whether it turned out to be

either too much or too little, the repairs were to be done within that time.

Applying that to the present case, when it is once established that the defendant was entitled to say that out of the six months shall be taken the time up till the 31st of December, because I was authorized by the plaintiff to hold my hand and not begin the repairs until then, it follows that the time within which he was to do the repairs would be six months after the 31st of December, and that time would not expire until the 31st of June, and, in fact, the repairs were all done before that—they were done by the middle of June. That being so, it appears to me that the judges in the Court of Appeal were correct in the judgment which they gave. The only point that I can see upon which they and the Common Pleas differed was whether it was to be six months, or an uncertain but reasonable time; and it seems to me that it ought to be the conventional time of six months, whether it was more or less than was actually required for the purpose. Consequently, my Lords, I think that the judgment of the Court of Appeal was right and ought to be affirmed, and this appeal dismissed with costs.

LORD GORDON: My Lords, I quite agree in the judgment of the Lords Justices, with the exception of that matter in Lord Justice James's opinion to which reference has been made, with regard to the intention to mislead on the part of the plaintiff. There is really no ground and was no necessity for condemning his conduct in that respect.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 5th June, 1877.

Solicitors for the appellant: *Campbell, Reeves & Hooper.*

Solicitors for the respondents: *Burchells.*

See 16 Eng. R., 481 note.

By the terms of a lease the lessor reserved the right to sell the demised premises, and it was agreed that upon such sale the lease should be determined and the term ended, the lessor to pay the lessee for all permanent improvements erected by him on the premises; the value thereof to be determined by arbitration, in case the parties could not agree. The lessor sold without reservation or exception. Held, that upon the sale the term ended, and the right of the lessee to compensation for improvements became absolute; that he was not bound to

attorn to the grantee and occupy under him, even if the latter were willing to regard the tenancy as continuing; and that upon refusal of the lessor to submit the value of the improvements to arbitration, an action would lie against him: *Morton v. Weir*, 70 N. Y., 247.

See *Elliott v. Johnson*, L. R., 2 Q. B., 120; *Ela v. Bankes*, 37 Wisc., 89; *Baillie v. Rodway*, 27 Wisc., 172; *Paine v. Rector*, etc., 7 Hun, 89; *Holsman v. Abrams*, 2 Duer, 435; *Kelso v. Kelly*, 1 Daly, 424; *Van Rensselaer v. Penniman*, 6 Wend., 569; *Wray v. Rhineland*, 39 How. Pr. R., 299, 41 N. Y., 619, affirming 52 Barb., 553.

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Where a lease authorizes the lessor to sell, and provides that the lease shall terminate on a sale and notice, the lessor may sell to his own wife if he does so *bona fide*, in *good faith*, even though one of his reasons for selling was a desire to terminate the lease.

The court charged the jury, that "If plaintiff only went through the forms of a sale and conveyance, not intending to vest the title in the wife on a good consideration, but only in form to convey to her until the lease could be terminated, and then make a conveyance, or lease the property subject to the disposition or control of the grantor, such a transaction would be a fraud on the defendant, and would not terminate the lease." Held, correct: *Ela v. Bankes*, 37 Wisc., 89.

A lessee put furniture and fixtures into the demised premises, under an agreement with the lessor that they should become the property of the latter at the expiration of the lease. During the term the lessor gave a bill of sale of certain furniture and fixtures so put in, to a third person. Held, that the lessor's right in them passed to such person by the bill of sale, and that he could maintain an action for their conversion, after the expiration of the lease, against any person refusing to deliver them on demand: *Thrall agst. Hill*, 110 Mass., 328; *Day v. Bassett*, 102 Mass., 445.

See *Ramsden v. Thornton*, L. R., 1 H. L., 129.

[2 Appeal Cases, 455.]

H.L. (E.), June 7, 8, 1877.

[HOUSE OF LORDS.]

455] *EDMUND BOWES, J. B. MARTIN, and W. L. KENT, Appellants; and CHARLES SHAND, ALEXANDER SHAND, and R. A. ROBINSON, Respondents (¹).

Cargo—Time of Loading—Condition Precedent—Usage of Trade—"Shipped"—Costs.

The construction of a contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the court.

Two contracts, each for the sale of 300 tons of rice, were made in London. The first contract (which the second exactly followed) was for 300 tons "of Madras rice, to be shipped at Madras, or coast, for this port, during the months of March ^{and} or April, 1874, per Rajah of Cochin." The 600 tons filled 8,200 bags. The vessel arrived at Madras in February, and on the 23d of that month 1,780 bags were put on board, and on the 24th of February a like number; on the 28th of February 3,560 bags were put on board, and bills of lading were given for those amounts on the days mentioned. A bill of lading for the remaining 1,080 bags was given on the 3d of March, but all, except fifty bags, had been put on board before that day. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March ^{and} or April:

Held, that the contract had not been complied with; that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given in this case, the plaintiffs could not recover on the contract.

Per LORD BLACKBURN: If an article sold is described, the description amounts to a warranty or a condition precedent that it shall be an article of the kind described.

The judgment of the Court of Appeal was reversed, and that of the Court of Queen's Bench restored, with costs.

Observations on "shipped" and "shipment."

Alexander v. Vanderzee (²) considered.

(¹) Reversing 19 Eng. R., 253; affirming 17 id., 133.

(²) Law Rep., 7 C. P., 530; 3 Eng. R., 279.

THIS was an action brought by Shand and others against Bowes and others for not accepting a cargo of rice.

The plaintiffs carried on business in London and at Madras, and *were the charterers of a vessel named the [456 Rajah of Cochin. Bowes & Co. were colonial brokers in London.

The declaration stated the contract to be that "the plaintiffs should sell and deliver to the defendants, and the defendants should buy and accept from the plaintiffs Madras rice, to be shipped at Madras, or coast, for the port of London, during the months of March ^{and}_{or} April, 1874, about 300 tons, per Rajah of Cochin," at &c., for "fair pinky." The prompt was to be "one month from breaking bulk." There was another contract for the same number of tons, expressed in the same form of words. The particulars of shipment to be declared when received. Plaintiffs alleged the arrival of the vessel and the refusal to accept.

The defendants put several pleas on the record. The 5th alleged that the contract was made subject to the condition that the rice should be shipped at Madras, or coast, for the port of London during the months of March ^{and}_{or} April, 1874, and at no other time; that it was not so shipped, but at some other and earlier time, and thereby was rice different in description and character from the rice in the contract mentioned. The 12th plea, which related to the contract for the second 300 tons of rice, repeated this defence.

There was also a denial that the particulars of the shipments had been furnished in due time. Issue on the pleas.

The cause was tried at Guildhall before Mr. Justice Brett and a special jury in the Michaelmas Sittings, 1875.

It appeared in evidence that the loading of the Rajah of Cochin was begun on the 17th of February, 1874, and between that date and the 1st of March, 1874, 8,150 bags were put on board. On Monday, the 2d of March, the remaining fifty bags were put on board. Four bills of lading were signed by the master and delivered to the shippers. They were dated on the 23d, 24th and 28th of February, and the 3d of March, and acknowledged the receipt on board on those several days of 1,780 bags, 1,780 bags, 3,560 bags (all in February), and 1,080 bags in March. The ship sailed from the Madras coast on the 10th of March, 1874, and arrived at London on the 14th of August. A correspondence took place between the parties, and on the 7th of September *Bowes & Co. refused to accept the rice. It [457

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was sold in December at a loss, and the action was brought to recover the difference between the contract price and the price obtained at the sale.

Mr. Robinson, one of the plaintiffs, was called as a witness at the trial, and, on cross-examination, he was asked whether a contract for a March or April shipment of rice did not mean that the rice was to be put on board in March or April, and he said (1) "when we sell rice, March or April shipments, it means that every bag should be put on board in March or April;" but he afterwards added, "there is a difference when the ship is named, in this respect." He stated that the particulars of shipment here were in fact declared as soon as received. On the part of the defendants, witnesses were called who asserted that it would not be a March or April shipment if a single bag was shipped in February. The defendant's manager said, "The bill of lading proves the date of shipment in absence of proof to the contrary."

One witness, Mr. Fraser (chairman of the Rice Brokers' Association), said: "The meaning of the phrase, 'Cargo March or April shipment,' is that every bit of the cargo is to be put on board in March or April." The learned judge left the case to the jury in this form, "Was this cargo, as a cargo, a shipment in March ^{and} or April in the ordinary business sense of the term? If it is for me, I hold the meaning to be, that, if the loading has been conducted consecutively, with ordinary and reasonable dispatch, and is completed in March or April, so that the vessel, so far as the loading of the cargo is concerned, may sail in March or April, that is sufficient." The verdict was found for the plaintiff, the foreman of the jury adding, "The name of the vessel being given in the contract." Mr. Justice Brett asked, "You agree with me that if the loading has been conducted consecutively, with ordinary and reasonable dispatch, and is completed in March or April, so that the vessel may sail in March or April, that is sufficient?" The foreman answered, "We do, more especially where the name of the vessel is mentioned." Leave to move was reserved.

A motion was made for a new trial, on the ground that 458] the *verdict was against the weight of evidence; but the court, finding that Mr. Justice Brett was satisfied with the verdict on that point, refused that rule. A rule was then obtained to enter judgment for the defendants; and on the 26th of April, 1876, the Queen's Bench ordered

(1) Judge's notes of the trial contained in the printed papers.

the judgment to be so entered⁽¹⁾. On appeal that judgment was reversed⁽²⁾. This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *Gainsford Bruce*, for the appellants: The words of the contract here are clear and express. The rice is to be shipped during the months of "March ^{and} or April." No other time can be substituted for the months thus named. There is no proof of a usage of the trade to give these words any but their ordinary and natural signification. On the contrary, the great weight of the evidence, even the admission of Mr. Robinson, one of the plaintiffs, was the other way, and showed that what was so stipulated must be literally performed. The suggestion that the mere naming of the vessel could affect the express words of the contract cannot be sustained. The case of *Alexander v. Vanderzee*⁽³⁾, relied on by the plaintiffs in the action, has really no application to this case. The whole contract there was doubtful. The ships were not known and could not be named. They were to be "three or more first-class vessels," and the shipment was to be in June or July, at the seller's option. The ships, such as were described, might not be obtained in the months named, a very large portion of the maize had really been loaded on board in June, and the bills of lading were dated in June. Substantially the shipment was in June, and the words of the contract were complied with. Here, on the contrary, by far the largest portion of the rice was put on board in February; only the very smallest, merely fifty tons, being loaded on the second day of March; and three out of the four bills of lading were dated in February. The jury had, therefore, in that case some ground for saying that the shipment was in June, while here there was no ground whatever for saying that the shipment was in March or April. The latter month was entirely out of the question. The former was so in *substance and in fact. The conditions of sale had, [459 therefore, not been complied with. The purchaser of this cargo has stipulated for a particular time during which the cargo shall be put on board, and he is entitled to the performance of what he has stipulated for. In *Busk v. Spence*⁽⁴⁾ the cargo was loaded in proper time at St. Petersburg, though the ship did not sail as warranted; but, there being a stipulation in the contract that the seller, as soon as he knew the name of the ship, should mention it to the buyer, and he not having done so for eight days after he had received it, Lord Chief Justice Gibbs held that this was a condition pre-

⁽¹⁾ 1 Q. B. D., 470.

⁽²⁾ 2 Q. B. D., 112.

20 ENG. REP.

⁽³⁾ Law Rep., 7 C. P., 530.

⁽⁴⁾ 4 Camp., 329.

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cedent, which not having been fulfilled, the plaintiff could not recover. The stipulation here is a condition precedent. In *Graves v. Legg* ⁽¹⁾ that rule was expressly acted on. There wool of a particular sort was to be deliverable at Odessa during August, and the names of the vessels were to be declared as soon as the wool was shipped. The defence to an action for not accepting the wool was, that in that trade the wool was not salable until the names of the vessels in which it was shipped had been declared, and that the plaintiff had neglected to declare them, and the defence was held good, for that the obligation to declare the names of the vessels was a condition precedent. Lord Justice Mellish, in this case, was wrong in treating the shipment of the very last portion of the cargo as practically a shipment of the whole cargo, for it was clear that there was a difference in the value of the cargo according to the time at which the period of shipping took place, and therefore it was that the purchasers had fixed the shipment at a particular time, and their distinct and express stipulation to that effect constituted a condition the observance of which could not be disregarded. Here, too, the plaintiffs were bound to declare the particulars of the shipment when received, which they had not properly done, and in that respect, too, they had failed to perform their part of the contract.

Mr. *Cohen*, Q.C., and Mr. *J. C. Mathew*, for the respondents: There is no real force in the objection that the particulars were not here delivered in time, the fact is the other way, and the cases referred to on that point are therefore inapplicable.

460] *The real question in this case is whether, because the cargo was begun to be loaded in February, though the loading was not completed till March, the defendants have a right to reject it? No just ground can be discovered for such a right. The limitation as to time means that the farthest extent of that time is not to be exceeded, and the plaintiffs were really doing what must be believed to have been desired by the defendants in beginning the loading in February, so as to be quite certain of finishing it in March. Shipped on board always means the concluding act of shipment, for till all the cargo has been put on board there is nothing which amounts to a shipment; the vessel is not able to sail till then, and nothing which the owner of the cargo requires can be said to have been effectively done. In *Alexander v. Vanderzee* Mr. Baron Martin said ⁽²⁾: "The words are, 'for shipment in June or July, shipper's option.'"

⁽¹⁾ 9 Ex., 709.

⁽²⁾ Law Rep., 7 C. P., 530, at p. 533.

The intelligible meaning of those words is not that the grain shall be ready for shipment in those months, nor that it shall be put on board in those months, but that it shall be loaded so that the ship may sail in June or July;" and he added that that was a question, not for the judge, but for the jury. The meaning of the words is necessarily that which the usages of trade recognize, and that was distinctly left to the jury, and has been found by the jury in favor of the plaintiffs. In that respect there can be no difference between the shipment of a "cargo" of rice and the shipment of so many "tons" or so many bags of rice. Till all are put on board the cargo is not on board, and, till then, there cannot be said to be a shipment of the rice beneficial to the owner of it.

In a case of this sort evidence of the usage of trade is admissible to explain the contract: *Lewis v. Marshall* ⁽¹⁾; here the jury treated that evidence as in favor of the plaintiffs. *Alexander v. Vanderzee* ⁽²⁾ was a case where the shipment of the maize was only partially made in the months named in the contract, and there was evidence in that case that maize shipped in May was more liable to get damaged than maize shipped in June, yet evidence of the usage of the trade was admitted, the question was left to the jury, and it was held that it was a proper question to be so left, *and the decision of the jury upon it was accepted [46] as conclusive. It ought to be so accepted here. There was no pretence for saying that the putting the rice on board in March or April was a condition precedent which must be specifically performed. That was like the promise by a foreign singer to be in London in time for rehearsals, which was held in *Bettini v. Gye* ⁽³⁾ not to bear that character, and the non-execution, of which did not affect his rights upon the contract. The general object of the contract was there taken into consideration by the court. *Graves v. Legg* ⁽⁴⁾ was really a case in favor of the plaintiffs, for it was the usage of the trade, the understanding of that usage by both sides, and the introduction of the particular stipulation into the contract, that were taken to be proofs of the intention of the parties to make the stipulation as to the names of the vessels a condition precedent; that constituted the ground for the judgment of the court. There was nothing of that sort here. The words "March ^{and} or April" were only words of description, limiting the time before the expiration of

⁽¹⁾ 7 Man. & G., 729; 13 L. J. (C.P.), 193.

⁽³⁾ 1 Q. B. D., 183.

⁽⁴⁾ 9 Ex., 709.

⁽²⁾ Law Rep., 7 C. P., 530.

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which the shipment was to be concluded; but there was nothing to show that the parties had intended that the shipment was to begin and to proceed in those months, and in them alone, and at no other time; and certainly nothing to indicate that the shipment was not to be begun before March. Nor could the fact of a great part of the shipment having been made in February afford a ground for the absolute rejection of the cargo. If any damage was thereby occasioned, it was the subject of a cross action.

Mr. *G. Bruce*, replied: This is a special contract with an express condition, and that condition has not been complied with. The foundation of the action therefore fails.

THE LORD CHANCELLOR (Lord Cairns): My Lords, I regret to have to propose to your Lordships to dissent from the decision, the unanimous decision, of the Court of Appeal in this case; and if I entertained any doubt, or if I had found that your Lordships entertained any doubt, as to the 462] *conclusion at which you should arrive, I certainly should have suggested that time should be taken for further consideration of the case. But I think your Lordships have no hesitation in arriving at the conclusion which I shall now propose to you.

My Lords, the case appears to me, when properly considered, to be an extremely simple one. The action is brought upon two contracts for the sale of rice, which differ only in respect of the price, and therefore it will be sufficient that I should refer to one of the contracts. The first of the two contracts is dated on the 17th of March, 1874; and the sold note, which is written to the respondents, Shand & Co., runs in these words: "We have this day sold for your account to Bowes, Martin & Kent, the following Madras rice to be shipped at Madras, or coast, for this port during the months of March ^{and}_{or} April, 1874, about (300) three hundred tons per Rajah of Cochin, eleven and ten pence halfpenny per cwt.; for 'fair pinky.'" That sentence includes all that for the present purpose it is material that I should refer to.

My Lords, so far as the construction of the contract expressed in those words is concerned, unless there be something peculiar to the words by reason of the custom of the trade to which the contract relates, the construction of the contract is for the court. That has been said so often that I need not refer your Lordships to any authority upon the subject. The court it is which, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of the custom of the trade, to any of the words of that con-

tract, has to place the construction upon the contract. I shall assume, in the first place, that there is no word in this contract which is proved by the custom of the trade to have any particular meaning. I shall afterwards consider whether it has been proved that there is any custom attaching a particular meaning to the words used.

My Lords, looking at the construction of these words, I put aside in the first place some which to any one unaccustomed to a contract of this kind, might appear peculiar, the words ^{and}_{or}, inasmuch as no question has been raised on these words, and it is agreed upon both sides that they are so used simply as a mercantile way of expressing that something is to be done in the months of March *and April, or in [463 either of those months. Putting that aside, and looking still at what would be the ordinary and the grammatical meaning of the words, it will I think occur to your Lordships that it is possible that the words which I have read may mean one of two things. It might be held that they mean that the rice which is spoken of, is to be put on board the ship which is mentioned, during some part of the two months specified, the months of March and April, 1874, and that that is the meaning of the words "to be shipped" during those months, or it might be held that they mean that the shipment is to be made continuously and in such a way as that it is to come to a conclusion in one of the months in question, and then a bill of lading, representing the shipment and the contract made on the shipment, is to be given inside of one of those months for the whole of the rice in question.

My Lords, if that is the natural meaning of the words, it does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance, and that alone might be a sufficient answer. But, if necessary, a farther answer is obtained from two other considerations. It is quite obvious that merchants making contracts for the purchase of rice, contracts which oblige them to pay in a certain manner for the rice purchased, and to be ready with the funds for making that payment, may well be desirous both that the rice should be forthcoming to them not later than a certain time, and also that the rice shall not be forthcoming to them at a time earlier than it suits them to be

ready with funds for its payment. Therefore it may well be that a merchant making a number of rice contracts, ranging over several months of the year, will be desirous of expressing that the rice shall come forward at such times, and at such intervals of time, as that it will be convenient for him to make the payments, and it may well be that a merchant will consider that he has obtained that end if he provides for the shipment of the rice during a particular month, 464] *or during particular months, and that he will know that provided he has made that stipulation the rice will not be forthcoming at a time when it will be inconvenient for him to provide the money for the payment. My Lords, there is still another explanation which appears upon part of the evidence in this case; because sufficient appears upon the evidence to show that these contracts were made for the purpose of satisfying and fulfilling other contracts which Messrs. Bowes, Martin & Kent had made with other persons, and it is at least doubtful whether if they had made a contract in any other form than that which is before your Lordships, a contract made in another form, or a contract made without this stipulation as to the shipment during these months, would have been a fulfilment of those other contracts which they desired to be in a position to fulfil.

Therefore, my Lords, still dwelling merely upon the natural meaning of these words, and without any evidence as to their having any particular or customary meaning, I should undoubtedly say, and say without hesitation, that the meaning of this contract must be one of two things. *Prima facie*, I should say it meant that the shipment must be made, that the rice must be put on board, during the two specified months, and neither before nor after those months. But if the contract does not mean that, the only other meaning which it appears to me it could have is—and as to that I think evidence would be required to show that by usage it had obtained that meaning—that the shipment should be made in a manner which could be described as continuous, and that it should come to a consummation or completion in one of these months which are here mentioned, and that the bill of lading should be given for the whole and complete shipment at that time. My Lords, if those two meanings be the only possible meanings of this contract, if they be the natural meanings of the contract, then according to neither meaning was the rice in this case put on board in such a way that it could be tendered in fulfilment of the contract; because the whole of the rice was actually on board, not merely at the time when this contract was made,

but during the month of February, with the exception of fifty bags, which were put on board on the 2d of March; and bills of lading had been given during the month of February for all the parcels of *the rice with the excep- [465
tion of 1,080 of the bags in respect of which a bill of lading was given on the 3d of March. According, therefore, to neither of those constructions would the rice have been put on board in such a way as to make it a tender in fulfilment of the contract.

My Lords, still dwelling upon the case without reference to what took place at the trial, or to any evidence with regard to any custom, I now turn from this construction, which I submit to your Lordships is the natural and only possible construction, 'literally, of the words, to the construction which the contract has received in the Court of Appeal. Lord Justice Mellish on this subject speaks in this way. He says: "The real question is, whether in order to fulfil a contract that 600 tons of rice should be shipped in March or April, it is necessary that the whole 600 tons should have been put on board in March or April, or whether it is sufficient that the shipment should have been completed in March or April." He then refers to a case which I shall afterwards have to refer to, and he continues: "The word 'shipped' is, we think, capable of both constructions, and even if it be admitted that its literal meaning would imply that the whole quantity must be put on board during the specified time, that is a construction which seems to put a fresh additional burden on the seller, without any corresponding benefit to the purchaser, and the consequence of adopting it would, we think, be that purchasers would, without any real reason, frequently obtain an excuse for rejecting contracts when prices had dropped." My Lords, I must submit to your Lordships that if it be admitted, as the Lord Justice is willing to admit, that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers without any real cause would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the *contract when [466

prices have dropped ; but that is no reason why a term which is found in a contract should not be fulfilled.

My Lords, the Lord Justice continues : "The sole object of the purchaser of such produce as this, in confining the seller to a particular time within which the goods must have been shipped, is, as far as appears, that he may know when the goods are likely to arrive." The Lord Justice takes no notice whatever of those other reasons to which I have referred, namely, that the merchant may not desire to be called upon before a certain time to pay the money, or that he may, in entering into a contract of this kind, have in view the fulfilment of some other contract, with an analogous stipulation, which a contract in any different form would not fulfil. The Lord Justice continues : "That object seems as effectually attained by knowing when the shipment will be, or has been, completed, as by knowing when each part of the goods was put on board." Then, my Lords, the Lord Justice says : "We therefore should entirely agree with *Alexander v. Vanderzee* (¹), even if that decision was not binding on us."

Now, my Lords, that makes it right that I should refer for a moment to the decision in *Alexander v. Vanderzee* (¹). The Court of Appeal in the present case appears to have thought that there was some rule of general application laid down by the decision of *Alexander v. Vanderzee* (¹) in the Exchequer Chamber, and that that rule was binding, or ought to have been held binding, on the court below in the present case. My Lords, I do not find that there was anything that could be called a rule laid down in the case of *Alexander v. Vanderzee* (¹). That was a case in which a contract somewhat similar to the present, but for Danubian maize, was made, and the contract stated that the maize was to be shipped in the month of June, and what took place was this : A great part of the maize was shipped in the month of May, that is to say, was put on board in the month of May. The remaining part was put on board in the month of June, and a bill of lading was given, on the completion of the shipment, for the whole parcel of maize. Then it appears that, at the trial of the case, this question was left to the jury : Was a shipment of maize, under those circumstances, commenced in May, concluded in June, and 467] *the bill of lading for the whole given in June, according to the understanding of the trade a June shipment ? The jury in that case found that it was a June shipment, and the majority of the Court of Exchequer Chamber thought

(¹) Law Rep., 7 C. P., 530.

that that question was properly left to the jury, and that the jury having answered it as they did, that disposed of the case. My Lords, your Lordships have not now to decide, and cannot now decide, whether what took place in the case of *Alexander v. Vanderzee* ⁽¹⁾ was the course which ought properly to have been taken with regard to the conduct of the case. We have not before us the evidence which was before the jury, or the form in which the question was left to the jury; but in that particular case the question, which seems in some form or other to have been left to the jury, was whether it was a June shipment, and the jury found that it was a June shipment. My Lords, I will assume that that decision was right, and that the mode in which that case was treated was the correct mode. It has no application to the present case. Your Lordships have not here what occurred in the case of *Alexander v. Vanderzee* ⁽¹⁾, a continuous shipment going on up to the period of completion, the completion being in the month specified, and a bill of lading given in that month. The case, therefore, of *Alexander v. Vanderzee* ⁽¹⁾ in the first place laid down no general rule; it proceeded on the finding of the jury in that particular case, and, whether it laid down a rule or not, the rule would not be applicable to a case like the present, in which the facts are different from the facts which occurred there.

My Lords, before leaving that part of the case, I must advert to a suggestion which was made at the bar on behalf of the respondents, although it does not appear to have been made in the court below. It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My Lords, I cannot think that there is any foundation whatever for *that argument. If the construction of the [468 contract be as I have said that it bears, that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. The construction may be shown by evidence to be different from what I have supposed, but if

⁽¹⁾ Law Rep., 7 C. P., 530.

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the construction be that which I have supposed, the plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfilment of the contract.

Now, having submitted to your Lords what I understand to be the natural and literal meaning of this contract, I ask how is that natural meaning to be got rid of? My Lords, I conceive in this way, and only in this way. It was of course competent for those who were resisting the application of this natural construction of the contract, to have said: We will prove by evidence that according to the custom of the trade, these words, which have this natural signification, are used in a wider or in a different sense. The natural meaning of the words is, no doubt, that the rice shall be shipped during those two particular months; but we will show that by the custom of the trade a latitude is allowed, and that provided the shipment has been conducted in such a way as that the ship will be able to sail during those two months, that means by the custom of the trade the shipping of rice on board during the months in question. That of course would, according to the well-known rule of law, which admits parole evidence not to contradict a document, but to explain the words used in it, supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used. That would be a legitimate and well-known mode of construing the document. Has any evidence of that kind been adduced here?

This is a case which certainly is one of the most singular I have ever observed in this respect. The defendants in the action put upon the record pleas, which repeated the stipulation in the contracts with regard to the shipment being made during the particular months, and one plea averred that the 469] stipulation not *only had that meaning, that the goods were to be put on board during those months, but that, negatively, they should not be put on board at any other time, and the parties went to trial upon those issues, among others. The plaintiffs in the action did not propose to adduce, and did not themselves adduce, any evidence as to any custom which would put upon the words in question any meaning different from whatever might be their ordinary or natural meaning. But the defendants not merely rested upon what they contended to be, and what as it seems to me was, the natural meaning of the words, but they proceeded to give evidence that that which was the natural meaning of the

words was understood by the trade to be their real meaning, and to be the meaning which the trade was in the habit of acting upon. That appears to me to have been on the part of the defendants a taking upon themselves an onus, and an effort to discharge an onus which, if it pointed to the producing of evidence at all was an onus that lay on the other side. It was for the plaintiffs, if they had any evidence of a custom controlling or explaining the natural meaning of the words in the contract, to produce their own evidence, and it was hardly necessary for the defendants to produce evidence which only professed to show that the words meant what naturally they would have appeared to have meant. However, the evidence was produced, and very strong evidence was produced, by the defendants to that effect, and what is still more remarkable, one of the very strongest pieces of evidence the defendants had on that point was the evidence of one of the plaintiffs, who, upon cross-examination, said, with at least as much distinctness and force as any of the other witnesses, that he would not consider rice put on board the ship during any months other than the two months specified to be a tender within the meaning of this contract. My Lords, in that state of things, so far from any evidence being produced by the plaintiffs to alter the natural meaning of the words, all the evidence was evidence going to show that the words ought to receive and would in the trade receive their natural and ordinary construction, and I think the learned counsel for the respondents at your Lordships' bar admitted with great fairness, and they could not have done otherwise than admit, that if the question were asked : *Was there here any evidence to go to the jury of a [470 custom placing upon these words a meaning different from their ordinary and natural meaning, the answer must be that there was no evidence of that kind to go to the jury. Therefore, I should submit to your Lordships, that that which appears to me to have been the only mode of controlling the natural construction of this contract was not a mode which was resorted to, or could be resorted to, in this case. There was nothing whatever in the evidence to go to the jury entitling the plaintiffs to say that a construction different from the ordinary meaning of the words should be put upon the contract.

My Lords, that is the more important, as bearing upon some other observations of the Lords Justices in the Court of Appeal. Your Lordships will remember that there were in substance two applications to the Court of Appeal. One was with reference to whether the verdict should be entered

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for the defendants; the other was with reference to a motion for a new trial; and with regard to the motion for a new trial on the ground that the verdict was against the weight of evidence, the Lord Justice Mellish thus expressed himself: "Several witnesses, and amongst them the plaintiff himself, have deposed that they understood the word 'shipped' to mean put on board, and that the whole quantity sold must be put on board within the specified time, and no witness says that the word in mercantile usage has any other meaning; and the jury appear to have based their verdict upon a distinction which, though made by one or two witnesses, we do not think satisfactory, between contracts in which the ship is named, and contracts which may be fulfilled by delivering goods out of any ship. On the other hand, we think it is obvious on reading through the evidence, that each witness was not speaking of any real mercantile meaning which the word 'shipped' or 'shipment' bears, but was putting his own construction on the word, and, as persons who are not lawyers are apt to do, interpreted the word literally. No witness stated that he had known instances of goods rejected, and such rejection acquiesced in, when the shipment had been completed within the appointed time, because the whole of the goods were not put on board during that time; and this is the sort of evidence, which, in our opinion, ought to be given 471] *before the rule established by the case of *Alexander v. Vanderzee* (') is departed from."

My Lords, I have already referred to that case, and to the supposition that it establishes any rule; but with reference to these observations of the Lord Justice I desire to point out to your Lordships that they appear to me to be based upon a degree of forgetfulness of what really was the state of things at the trial of the present case. The Lord Justice speaks as if witnesses had been brought forward to establish a custom controlling or altering the natural meaning of the words. Had that been the case, I agree that it would have been extremely proper to examine with minuteness and with criticism the evidence so given, to look upon it with suspicion, at all events with care, as you must always do upon evidence which proposes to fix upon words a non-natural meaning or an acquired meaning. But these witnesses were not brought forward to fix upon words a non-natural or an acquired meaning. They were brought forward for the very simple and innocent purpose of saying that they had always understood that the words bore their

(') Law Rep., 7 C. P., 530.

natural meaning and had no acquired or secondary meaning in the trade. Under those circumstances I am myself at a loss to conceive how witnesses could have said anything else than that, in general terms, that was their opinion of the meaning of the words, and that was the way in which, in the course of their trade, they had always known them to be acted upon.

My Lords, that really disposes of the whole of the case. If there had been any conflict of evidence, if there had been any evidence in opposition to that given by the defendants, your Lordships might have had here to consider whether the verdict had been satisfactorily arrived at, and whether there ought not to have been a new trial, but it being the case, and it being in fact admitted, that there was no evidence the other way, that there was no evidence to go to the jury of the words having any non-natural signification, the question resolves itself simply into the ordinary and natural construction of this contract as a document the construction of which must be placed upon it by the court. Then, my Lords, I repeat, the case of *Alexander v. Vanderzee* ⁽¹⁾ has not *laid down any rule of construction applicable to [472 the present case, and the document lies before your Lordships for you to put the natural and ordinary construction on the words. That natural and ordinary construction appears to me free from doubt and free from ambiguity, and it is a construction which will give to the contract, and must give to it, a meaning, showing that the contract here has not been complied with, and that the goods tendered are not goods which were shipped according to the contract. I, therefore, my Lords, submit to you that the plaintiffs have failed in making out their case. That was the opinion of the Court of Queen's Bench, before which the case came in the first instance. In my opinion, the determination of the Court of Queen's Bench was correct, and the Court of Appeal ought to have dismissed the appeal which was made from the decision of the Court of Queen's Bench. Your Lordships, if you take that view, will now hold that the Court of Appeal ought to have dismissed the appeal with costs, and you will restore the judgment of the Court of Queen's Bench. And, my Lords, acting upon a principle upon which your Lordships have already professed your intention to act in proceedings under the new Judicature Act, you will, I think, couple with that the awarding to the appellants in this case the costs of this appeal.

(1) Law Rep., 7 C. P., 530.

LORD HATHERLEY: My Lords, I entirely concur in the result at which my noble and learned friend on the woolsack has arrived with regard to this case. I pass altogether from the case of *Alexander v. Vanderzee* ⁽¹⁾, because, for the reasons which have been already assigned, it appears to me to be distinguishable from this case, and to have laid down no rule whatsoever which can be usefully applied to the case now to be decided.

There are traces in the evidence before us of this being a contract of no unusual character. A portion of the evidence which was given by Mr. Robinson with reference to the fact of there being a ship named specifically in the contract, as distinguished from cases in which the ship is not so named, shows in itself that these contracts are common. 473] The observation he makes is this: When asked what difference the naming of the ship makes, he says: "It makes no difference as to the shipment. It takes it out of the category of the usual run of March or April shipping contracts," from which I infer that there is a "usual run" of contracts of this sort, and that a course of practice and dealing has been established which we ought to be very careful in no way to interfere with. I apprehend, my Lords, that nothing can be more unbecoming in courts of justice than an endeavor in any way, by any strained rule of construction, to get rid of the plain and simple effect of the contracts which they have to construe. Our duty as judges in cases of this description, as contrasted with the duty of a jury, is this: If the contract bears a plain natural sense and meaning, nothing should make us deviate from that plain natural sense and meaning, but the strongest evidence, not of the opinion of this or that witness, but of a custom of the trade or business which forms the subject-matter of the contract, which has given an unusual, and, as it has been called by the noble and learned Lord who has addressed us, "a non-natural" meaning to the contract. No evidence of that description has been produced in this case. We have got, as it appears to me, plainly and simply to construe this contract according to the words we there find. The only word in the contract which would admit, as it appears to me, of any technical interpretation is the word "shipped." It may be well with regard to a word which was not sufficiently understood before, or with regard to words which have a special and technical force, to establish (if it can be established) upon evidence, any usage which has attributed to such words any special or peculiar force. It does not

(1) Law Rep., 7 C. P., 530.

appear to me, however, that in the present case any such evidence is needed. I think the meaning of the word "shipped" is sufficiently understood by this time in commerce. But if it were needed I think we have sufficient evidence before us that by the word "shipped" all the witnesses understand put on board. I read the contract therefore as if it said "put on board at Madras, or coast, for this port during the months of March ^{and}_{or} April, 1874."

Now, your Lordships will observe that it is not "*in*" the months of March ^{and}_{or} April; it is not that the goods are to find themselves on board, and to be there within that period, namely, the months *of March ^{and}_{or} April; but it is [474 that they are to be shipped—that is to say, to be put on board—during those months, implying a continuous act of shipping by which these goods are to be placed in the position in which they are to be placed according to the meaning of the contract. It is not surprising that a state of things has arisen upon which there might be some controversy, for this reason: owing to the distance of the district from which the goods were to come, the parties to the contract of the 17th of March could not, or did not, ascertain the exact state of things at the date of the contract; and in truth the goods which have been tendered to the defendants were all on board at the very date of the contract itself, namely, on the 17th of March. They had been put there, therefore, of course with no reference whatever to the contract and its terms; and it is not surprising that this shipment or embarkation of the goods made before the contract was entered into, but without knowledge of the contract, should not be found to square with that instrument. The consequence is, that we have here, as it seems to me, an engagement to supply rice to the defendants, the character of which rice was to be this: it was to be rice to be shipped during these two particular months, March and April, or either of them, and not otherwise.

Now under these circumstances, and with the plain meaning of the contract lying, as it appears to me, on its surface, we are not entitled to speculate on the reasons and motives which have induced those who are engaged in this particular trade, those who have this "usual run," as the witness describes it, of contracts before them from time to time, and who must have pondered upon the matter, to frame their contracts in the manner which pleases them best. We must assume that it is owing to the custom of the trade that they have determined to frame them in this fashion. They do

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not stipulate either that the goods shall be found on board at such a time, or that the goods shall be on board before the end of the month of April; that would have been a very simple mode of expressing it, if that was what they wished; but they do expressly say that the goods shall be shipped—that is to say, put on board—during these two particular months, or one of them.

Now, the learned judge who tried the case and addressed the jury in the first instance appears to have reasoned upon 475] the *motives which might probably have induced such a contract to be entered into; and also Lord Justice Mellish, in the Court of Appeal, did in some degree consider how far, in his judgment, a reason could be assigned for such a form of contract. Mr. Justice Brett says, in addressing the jury, that if the burden be thrown on him of construing the contract, “I construe it thus: That the meaning of it is, that if the loading has been conducted consecutively with ordinary and reasonable dispatch, and is completed in March or April, so that the vessel, so far as the loading of the cargo is concerned, may sail in March or April, that is sufficient; that is a March or April shipment.” He seems there to read the contract, in fact, as I have just expressed it, as if the contract had been that the ship should be loaded before the end of April; that is the construction which, in his view of it, expressed as he expressed it, it would convey. He goes on to say, “That is, if I have to construe it, if there be no generally understood meaning of this phrase in the trade. Now, that seems to me to be the natural meaning of it—I mean in such a produce as rice—where the thing to be shipped is from a country where the produce is grown and where there is no difference in the article itself, which will itself be sent forward, whether it be sent forward in February, March, or April.”

My Lords, the view that I take of the contract, I confess, is this, that it is not the article rice only that is sold, but the thing that is sold is the article rice shipped in March or April, and that the article rice shipped in February is not the article which has been purchased by the defendants.

The Lord Justice says, in very much the same phraseology, that the word “shipped” is capable of the two constructions of meaning—either begun and finished to be put on board, or the putting on board completed in March or April. He says: “The word ‘shipped’ is capable of both constructions, and even if it be admitted that its literal meaning would imply that the whole quantity must be put on board during the specified time, that is a construction

which seems to put a great additional burden on the seller without any corresponding benefit to the purchaser, and the consequence of adopting it would, I think, be that purchasers would, without any real reason, frequently obtain an excuse for *rejecting contracts when prices had [476 fallen." Now, with the greatest possible respect, and I am sure no one judge ever entertained more respect for another than I entertain for the Lord Justice Mellish, I do think that that is a very hazardous way of construing a contract, namely, to say in a class of contracts having a great range, that the judge can see, upon the face of the contract, a sufficient reason to reject what may be the literal interpretation of it, for that if such literal interpretation is to be applied, there would be an excuse afforded to parties for rejecting contracts. The danger of such a construction is extreme, because it is impossible to know all the causes which may have induced the persons to put words into a contract. If the words have a certain definite meaning, it is dangerous to depart from that meaning until you can arrive at any sound ground upon which you should do so; it is dangerous to depart from it upon a conjecture that it can make no difference to the parties, and especially you cannot reject the literal construction because you think that, unless you reject it, you may be affording an opportunity for an evasive purchaser to escape from his bargain. Of course, as has been already observed, in many cases a purchaser is desirous of escaping from his bargain, and if he finds that the bargain which is attempted to be enforced as against him, is not only burdensome upon him, but is against the letter of his contract, there is nothing in our law which prevents his availing himself of that answer to the case made against him, namely, that he has not entered into the engagement you allege, and if you seek to fasten upon him the engagement, you must first bring him within the four corners of the contract.

What Lord Justice Mellish says is very much like what Mr. Justice Brett said, namely: "The sole object of the purchaser in such a purchase as that now in question in confining the seller to a particular time within which the goods must have been shipped, is, as far as appears, that he may know when the goods are likely to arrive. That object seems as effectually attained by knowing when the shipment will be or has been completed, as by knowing when each part of the goods was put on board." That is, assuming in the first place that the only object you have in view is to know when the ship may arrive, but having assumed that, it far-

477] ther *assumes that your object is to know the latest period at which it may arrive. Now, I apprehend my Lords, that it is important to persons entering into contracts of this description to arrange all their contracts for the whole course of the year, after the calculations they have made as to what particular times they will be in funds to meet their engagements, and it is just as important to them to know how long it will be before the ship arrives, as to know how soon it will be that the ship will arrive. They do not wish the goods to arrive sooner than the time when they have made their arrangements for them, and they do not wish them to arrive later than the time for which they have made their arrangements. And if they have specifically named the months of March and April, they mean those two months. They do not mean to purchase goods placed on board in the previous month, February, which therefore would, or might arrive, at a different season from that at which they specially engaged by the contract to accept the goods, which goods, by the nature of the contract, are to be paid for immediately on the ship's arrival.

Well, my Lords, that really seems to me to amount to the whole case, because, as regards the evidence which has been produced in this cause, I entirely agree in what has been already said, that that evidence, if it was required at all, or if it is admissible at all, has, if anything, strengthened what appears to my noble and learned friend on the woolsack, and appears also to me, to be the natural construction of the contract. All the witnesses, uniformly, beginning with one of the plaintiffs themselves (that is a very curious thing), and following through the rest of the witnesses, state distinctly that which the judge, Justice Brett, at last put to one of those witnesses, "what you mean to say is, that March is March and April is April." That is pretty much the case, and one could hardly put in a clearer point of view one's own opinion that in reality the contract is simple and easy to be construed, and that "March" in the contract does mean March, and that "April" does mean April, and that the loading "during the months of March and April" does mean a loading during those months.

My Lords, without detaining your Lordships any longer upon the case, which has been so fully and amply gone into, I am content to say that I do not think this case is at 478] all governed by *the case of *Alexander v. Vanderzee*⁽¹⁾, nor do I think it necessary to say anything whatever upon that case. I think it is plain upon the construction of the

(¹) Law Rep., 7 C. P., 530.

contract that we have before us, and I think that that contract was not performed in such a manner as that the defendants were compelled to accept, upon the tender to them, goods which were shipped in the month of February, instead of goods which were shipped in the months of March or April, or one of them. The February shipment applied to the whole of the goods with the exception simply of the fifty bags which have been mentioned. We have it in evidence that those fifty bags amounted to four tons weight out of 300 tons, that is to say, one seventy-fifth part of the whole subject-matter of the contract. It appears to me that the defendants could not be obliged to accept a tender of those bags separate and distinct from the complete contract they had entered into for the whole 300 tons, the large bulk, indeed almost the entirety, of which was shipped in a different month from that which they had contracted for, and therefore was not of such a character as to be deliverable to them in fulfilment of the contract they had entered into.

LORD O'HAGAN: My Lords, I have reached the same conclusion, and substantially for the same reasons. I shall not repeat those reasons, or go again through facts and documents that have been already abundantly discussed. The question is of public importance, and the conflict of judicial opinion upon it shows that it is not without serious difficulty. But the grounds of decision lie within a very narrow compass, and, for myself, I shall state them in a very few words. As to the authority mainly vouched by the plaintiff, I concur with my noble and learned friends that it is distinguishable and does not rule this case, which must be dealt with on its own special circumstances.

We have to consider a written contract, carefully prepared and deliberately acted on, the terms of which are clear and intelligible, and convey very distinctly the purpose of the parties to it. Regarded in themselves, those terms are the proper subject of *construction by a court, and not by [479 a jury; and they appear to me fully to sustain the contention of the defendants. Commercial usage, or the well-established understanding amongst mercantile men, may sometimes be applied to put on words, apparently distinct, a sense other than that which reasonably and naturally belongs to them. But of such a usage or understanding the plaintiffs have given no proof whatever, leaving the words employed to the interpretation of the court, according to their ordinary import and effect. On the other hand, the defendants have relied on a considerable body of testimony to prove that the

sense commonly attributed to the words is that which is put upon them by commercial people. This testimony, if it was needed, would be of much weight and persuasiveness. I do not think that it was. I think that if oral evidence was to be given at all, it should have come from those who wish your Lordships to interpret plain phraseology against its common import. But it is curious and striking that all the witnesses are of one way of thinking, and all of them declare that the literal meaning is the true meaning, and recognized universally as such by those whose occupations and interests bring them continually in relation with agreements of this kind.

I thought, for a time, that there must be a reinvestigation of the case, and that the verdict of the jury should be set aside as against evidence, if not for misdirection. But, having satisfied myself that the decision properly rested with the court, and that nothing had been offered, on either side, to raise a jury issue; and deeming the words of the contract plain and unequivocal, I feel bound to adopt the proposal of my noble and learned friend, and advise your Lordships to allow the appeal.

I do not think that we are at liberty to speculate as to motives, or to consider what comparative benefit might practically have arisen from a shipment in February or a shipment in March. I can see good reason at least for the stipulation that it should definitely be in the one month or in the other. But the plain fact is, that the defendants bargained for a shipment during March or April, and for nothing else; and as that which was offered to them was substantially a shipment of February, they were not bound to *accept it. The appeal must be allowed with costs, and the judgment of the Queen's Bench restored.

LORD BLACKBURN: My Lords, I am entirely of the same opinion.

The question arises upon two contracts; they are in the same words: [His Lordship read the words.] The first question which arises is, what was it that, according to that contract, the plaintiffs were to supply, and that the defendants were bound to take under that contract.

It was argued, or tried to be argued, on one point, that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject-matter of the contract went, its being shipped at another and a different time being (it was said) only a breach of a stipulation which could be compensated for in damages. But I think that that is quite untenable. I think, to adopt an illustration which was used

a long time ago by Lord Abinger, and which always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and before the defendants can be compelled to *take anything in [48] fulfilment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it.

That being so, the question which arises in this case is, whether the rice here tendered was shipped within the period stipulated for or not. That evidently involves in it two questions: first, what is meant by the word “shipped” as used in this contract? and, secondly, the question of fact whether the things which are proved in evidence to have taken place as regards these defendants did amount to a shipping of the rice within the meaning which ought to be put upon the contract.

Like my noble and learned friend on the woolsack, before saying a word about the evidence which was actually given with regard to usage and custom, I will proceed to consider what is the meaning which your Lordships should, in the absence of any evidence of mercantile usage, put upon the word “shipped” in a contract of this sort. Supposing we had no help from mercantile usage, and had nothing to guide us but that general knowledge of dealings and of what takes place which judges judicially possess and take notice of, what would that contract mean? It seems to me that

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where a parcel of goods is begun to be put on board on or after the 1st of March, and they are all finally put on board so that the shipping is entirely completed before the 31st of March, and nothing then remains but to take the bill of lading for them, there can be no doubt that that is a March shipment; the whole shipment is completed in that month. But there would be a good deal more difficulty in saying whether it was a March shipment or not, if the case were this: suppose the shipment of a large parcel of goods goes on, as one transaction, which occupies several days, suppose, for example, the shipment of a large parcel of goods which may take ten days or so to put on board, has been begun before the end of the month of February, and has been proceeded with continuously with reasonable dispatch, and in the ordinary way as a matter of fair dealing, and the completion of the shipment is in March although the commencement was in February, and the bill of lading is taken in March, I think the materiality of the bill of lading would merely be as evidence to show that the shipment was then completed. I do not think that the delaying of the bill of 482] *lading for a fortnight would make the date of the shipment a fortnight later. I think the material thing is the completion of the putting it on board, which would entitle you to the bill of lading; but the bill of lading would be strong, and in most cases conclusive evidence, of the date when the shipment was really completed. I think, in a case of the sort I have supposed, there is a serious and grave question, whether or no the shipment may be considered as being made partly in one month and partly in the other, or whether it may not be considered as made at the time when the one indivisible transaction of putting those bags of rice on board was ended and completed, resulting in the whole parcel being on board, so that there is now a right to say: We have shipped this cargo, or portion of cargo, and we are now entitled to a bill of lading.

That, my Lords, was the case which arose in *Alexander v. Vanderzee* ('). The majority of the Court of Exchequer, the Lord Chief Baron dissenting, said that that was a sufficiently ambiguous matter to make it a proper question to ask the jury whether this was a shipment in June or not, that being the month when it ended, having begun in May. The decision was, that it was a proper case to take the opinion of the jury upon. I see that I said, standing, as far as I can perceive, alone in that respect, that without the aid of the finding of the jury I should have come to the same con-

(') Law Rep., 7 C. P., 530.

clusion. I do not mean to say more about the case than this, that without saying I was wrong upon that, I have a very considerable hesitation and doubt in saying now that I was right. I pass by that case with merely that observation, and leave it as it stands.

When this case came before the Queen's Bench Division, and I had to give judgment, I could not consider whether the decision in *Alexander v. Vanderzee*(¹) was right or wrong. Being a decision of the Court of Exchequer Chamber, it bound me, and consequently it was absolutely necessary, for the purpose of the decision there, to distinguish the case and show that it was not the same as *Alexander v. Vanderzee*(¹). Now, when I am advising your Lordships in the House of Lords, that is no longer so; I am not bound to say that the decision in *Alexander v. Vanderzee*(¹) is good; *but it is quite enough for the purpose of ad- [483
vising your Lordships what conclusion you should arrive at here to say, that I do distinguish the present case from *Alexander v. Vanderzee*(¹), and that I think it is distinguishable now, for the same reasons as those for which I distinguished it in the Court of Queen's Bench, where it was absolutely necessary to distinguish it.

The facts are here that the great bulk of this rice was put on board during the month of February. For the great bulk, nine-tenths of it, bills of lading were signed in the month of February. With regard to the remaining one-tenth, a large part of that one-tenth was put on board in February, but a small portion amounting, I think, to four tons, was put on board in March, and the bill of lading for the last parcel was signed in March. Under these circumstances, it seems to me, that putting aside the mercantile evidence altogether, or having none, it is quite clear that as far as regards those nine-tenths which were put on board in February, and the shipment of which was completed in February, as was indicated by the taking of the bills of lading then, it was not part of a continuous operation eked out by putting on board four tons more in March. It seems to me that it was so completely a February shipment that, had this contract been slightly differently worded, and had it said "shipped in February," instead of saying "shipped in March ^{and}_{or} April," the defendants clearly must have taken this as a February shipment—they could not have rejected it. I think that equally applies to the present case; being a February shipment it cannot be a March shipment.

I observe that in delivering the judgment of the Court of

(¹) Law Rep., 7 C. P., 530.

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Appeal, Lord Justice Mellish—(and I suppose I need hardly say that every word which comes from him I consider with the greatest respect, and do not differ from, without thinking over it very much)—takes a different view of it. He says ('): "We have therefore to consider whether, having regard to the terms of the two contracts, the circumstance of several bills of lading having been signed for different parcels of rice, instead of the whole being shipped under one bill of lading, makes any difference. A bill of lading is no part of the shipping of a cargo, it is only a declaration that the cargo has been shipped and is to be delivered 484] on certain *conditions." I quite agree that a bill of lading is no essential "part of the shipping of a cargo," or rather a parcel of goods, for "cargo" is an inaccurate word to use in reference to this case. A parcel of goods may be put on board a ship without a bill of lading at all; it is no necessary part therefore of the shipment. But when the question is whether there has been a shipment within a particular time or not, the fact that a bill of lading has been made out and signed is, to my mind, evidence, and until a mercantile man appears to tell me that it makes no difference, I should regard it as conclusive evidence that, as far as regards that portion of the shipment for which the bill of lading is signed, it is then completed, and is at an end. It is in that way that I consider it as being a decisive and important question, and I must say that, to my mind, the reasoning of Lord Justice Mellish, and the other learned justices of appeal who agreed with him on that part of the case, is not sound.

I think, therefore, that it comes round to this, that *prima facie* in the absence of mercantile evidence, or the like, the true construction of the contract is that "shipped in March" bears such a meaning that the portions or parcels of goods put on board in this case in February, and so completely put on board and shipped that bills of lading were signed for them (I say nothing about the last parcel), were not March shipments, they were not shipped in March, and consequently in the absence of mercantile usage the defendants are entitled to judgment.

As to the mercantile usage, I shall say scarcely anything upon that subject, for it really comes round to this, that the plaintiffs did not attempt to give any mercantile evidence; they did not mean to do so. They said (erroneously, I think,) the construction of the contract without mercantile usage is in our favor. The defendants might have rested

(') 2 Q. B., at p. 114.

upon that, but the jury having found, as has been said in *Alexander v. Vanderzee*(¹) that, in that particular case, there was a different mercantile meaning to the thing, they were afraid of that, and they took upon themselves to prove the negative—they took upon themselves to say, although in *Alexander v. Vanderzee*(¹) it was said that there was mercantile usage applying to that case, we will prove, affirmatively, the negative *here—we will show that [485 there is no mercantile usage applying to this case. Now, I agree with what has been said by my noble and learned friend on the woolsack, that taking up that position you could hardly expect them to give instances of it. They say the thing was never done, and they could not give instances, When asked was it done? all they can answer is, It was never done in our experience. They took upon themselves to prove that there was no custom; nobody was trying to prove that there was a custom the other way, and I think your Lordships are not only entitled, but bound, as it seems to me, to act without regard to the question which was asked and to which no answer was given, as to whether or no there was any difference in the meaning of this contract established by mercantile usage, of which certainly no evidence was given.

My Lords, taking that view of the case, it seems to me that the judgment should be for the defendants, as it was originally given in the Queen's Bench Division, and I perfectly agree with what the noble and learned Lord on the woolsack has proposed, that the order as to costs should now, and in future cases of the same kind, give an indemnity, and therefore include the costs in this House as well as the costs in the court below.

LORD GORDON: My Lords, this is a very important question with reference to mercantile law, and it is very interesting to lawyers. I think it is one well worthy of the consideration which it has received from your Lordships.

The question is a very simple one, arising on the terms of a mercantile contract, which is for the sale of rice at Madras, to be shipped during the months of March ^{and}_{or} April. Now, the terms which are used in these contracts are naturally the result of the intelligence of the merchants who are engaged in making them, and we may rely upon this, that they have considered well the terms of the contract before they entered into it. What your Lordships are proposing to do is to adhere to the words of the contract. These contracts are very often expressed in short terms, and there-

(¹) Law Rep., 7 C. P., 530.

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fore it becomes necessary to have evidence of custom in order to explain them. In the present case the parties who 486] were *the defendants in the court below, thought that they might better their case by leading evidence, in order to support their views by showing the custom of trade; but the rule is clear and distinct that, where we have a written contract, the question of the construction of that contract is for the court, and the courts therefore do not admit evidence of custom, unless they see reason for considering that there is some dubiety in the terms of the contract. In the present case I am clearly of opinion that there is really no reason for any dubiety or ambiguity in the terms of the contract. The only words which would suggest any, are the word "shipped" and the following words, which may appear to be somewhat technical, "during the months of March ^{and}_{or} April, 1874." But there was no evidence which showed that there was a custom of trade which would explain away the terms used, and therefore we have no question here,—really there never has been any such question in this case,—as to whether we should allow evidence of custom to be admitted in this case.

That being the case, we must construe the contract itself, according to its reasonable and literal sense, and I think we have no difficulty whatever in doing so. The safest rule in all these cases is to allow the parties who were interested in making the contract to explain themselves. It is our duty to adhere to the terms they have used unless there is raised an ambiguity which is owing to any supposed custom of trade, evidence of which might be admitted with a view to control the terms of the contract. That is not the case here, and I concur in the proposed judgment.

Judgment of the Court of Appeal reversed: Judgment of the Queen's Bench Division restored: Declared that the appeal from the Queen's Bench Division to the Court of Appeal should have been dismissed with costs, and that the respondents should pay to the appellants the costs of the appeal to this House.

Lords' Journal, 8th June, 1877.

Solicitors for the appellant: *Latley & Hart.*

Solicitors for the respondent: *Stevens, Wilkinson & Harries.*

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[HOUSE OF LORDS.]

***DIRECTORS, &C., OF THE PRUDENTIAL ASSURANCE [487
Co., Appellants; and EDMUND EDMONDS, Respondent.**

Life Policy—"Never been heard of"—Misdirection—Bill of Exceptions.

A policy on the life of R. Nutt was granted in 1863. An action was brought upon it in 1874, and the question was whether Nutt was then alive or dead. He had been absent from his former home for more than seven years, having left it in 1867. His sister and brother-in-law, who lived where he had formerly lived, gave evidence as to his absence, and said that they had not heard of him for more than seven years. On cross-examination, they said that a niece of his had said that when she was in Melbourne, in December, 1872, or January, 1873, she saw a man whom she believed to be her uncle Nutt, but he was lost in the passing crowd before she was able to get to speak to him. No effort appeared to have been made to find him at Melbourne, and the other relatives believed the niece to have been mistaken. The jurymen expressed a similar opinion. The judge directed the jurymen that they "could not say that the man had not been heard of during the last seven years when one of his relatives declared that she had seen him alive and well within the last three years; and still less could they say that he had never been heard of, when all the members of the family stated that they had heard what she had stated," and "that the ground for the presumption of death from a man having been absent for seven years was entirely removed by the direct evidence that every relative had heard that he was alive." And, lastly, His Lordship said to the jury, "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove exactly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendants." The Court of Appeal had considered this to be a misdirection, and had ordered a *venire de novo*. On appeal to this House, the Lords were equally divided, and so the decision of the appeal court stood affirmed.

Per LORD BLACKBURN: When there is a case tried before a judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the judge is to give a direction upon the law to the jury, so far as to make them understand the law as bearing upon the facts. Farther than that it is not necessary for him to go.

ON 28th of September, 1863, the appellants granted a policy of assurance on the life of one Robert Nutt. Mr. Edmonds, the *respondent, became the assignee of [488 that policy, and on the 16th of April, 1874, brought an action to recover its amount.

There were several pleas, of which those now material to be considered were the second, that Robert Nutt had not died as alleged, and the third, that satisfactory proof of the death of the said Robert Nutt, as required by the said policy, has not been received at the office of the defendants, the now appellants.

The cause was tried before Lord Chief Baron Kelly at the Croydon summer assizes, 1875, when the plaintiff gave evidence to show that Nutt had carried on business as a tailor

at Cheltenham, failed in business in 1864, became of drunken and dissipated habits, left Cheltenham in May, 1867, when he was about thirty-four years of age, suffered at that time from inguinal hernia, had relations in and near Cheltenham, and that none of them had received any communication of any kind from him since that time. That the plaintiff had made inquiries about him, and learned that he had gone to Aldershatt about September, 1867, and obtained employment there as a tailor, but had been dismissed on account of drunkenness, and had then disappeared. Alder, a brother-in-law of Nutt, and Mrs. Alder, Nutt's sister, were called, and said that nothing had been heard of Nutt by any of the relations from the time he left. On cross-examination these witnesses said that a Mrs. Chrieman, a niece of Nutt, said that she had seen him in Melbourne in 1872 or 1873, but they did not believe that the man she had seen and supposed to be Nutt was really that person.

Mrs. Chrieman was called by the defendants. She stated that she had, when a girl, resided in the same house with Nutt, that she was fifteen years old when he left; that in December, 1872, or January, 1873, when she was standing in a crowded street in Melbourne, a man passed her whom she recognized as her uncle Nutt; he was well dressed, and apparently well to do. She did not speak to him, as he was lost in the crowd when she turned to do so. She wrote of this to her mother, and on returning to England in 1873 told her relations at Cheltenham that she had seen her uncle.

The jurymen, through their foreman, thereupon stated to the Lord Chief Baron that they did not consider this evidence as conclusive that she had seen her uncle. Mrs. 489] Chrieman, senior, *was then called, and proved that she had received a letter from her daughter in which the seeing of Nutt was mentioned; Mrs. Chrieman, junior, did not appear to have made any inquiries at Melbourne about Nutt.

The counsel for the plaintiff called on the Lord Chief Baron to direct the jury that there was evidence that Nutt had been absent for above seven years without being heard of, and that he had not been heard of if Mrs. Chrieman, junior, was mistaken; and if the jury, from the improbabilities of the case or otherwise, believed her to be mistaken, then Nutt, having been absent for above seven years without being heard of, must be presumed to be dead. But the Lord Chief Baron gave the following direction to the jury:—

“ ‘Not being heard of’ means this, that no member of the

family has heard anything about him which might raise a reasonable doubt in their minds whether he must have been no more. You cannot say that a man has never been heard of, when, in the first place, one of his nearest relations actually comes and says she saw him alive and well within three years; still less can you say that he has never been heard of, when every member of the family states that they heard that which is now stated. You cannot have any one called before you who saw him die or saw him buried. You have, therefore, no direct evidence except the evidence that he was alive two or three years ago; on the other hand, you have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of the relatives has come forward, and every one of the relatives heard that he was alive in 1872 or 1873. I, for myself, looking to the whole of the case, not only can see no evidence upon which you would be justified in finding that he was dead, but the very ground of the presumption, which sometimes arises, of death, from a man having disappeared, and then never having been heard of for seven years, is entirely removed by the most positive and direct evidence that every relative he had at Cheltenham, or, so far as we know, in the world, has heard that he was alive. Then, when you come to ask yourselves the question, whether what they heard was what ought to have satisfied them, at the *least, that he might be [490] alive, you have before you a person on whom no one pretends to cast any reflection, whatever may have been the language in which she made the communication she made to the relatives, who now states positively on her oath that she has no doubt on the subject, and that she saw him and knew him, and that it was her uncle Robert Nutt.

“Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove directly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendants.”

The jury thereupon gave a verdict for the defendants. The plaintiff's counsel excepted to the direction, and a bill of exceptions, containing the above form of direction to the jury, was prepared and duly signed and sealed by the Lord Chief Baron.

The case was taken to the Court of Appeal, where the Master of the Rolls, Lord Coleridge, and Mr. Baron Pollock

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agreed that the case must go down. The defendants in the action then brought this appeal.

Mr. *J. C. Day*, Q.C., and Mr. *Morgan Howard*, Q.C. (Mr. *Harben* was with them), were for the appellants, and

Mr. *R. B. Finlay* (Mr. *Benjamin*, Q.C., was with him), for the respondent.

Doe d. Knight v. Nepean ⁽¹⁾, *Doe d. George v. Jesson* ⁽²⁾, *Doe d. Lloyd v. Deakin* ⁽³⁾, *Doe d. France v. Andrews* ⁽⁴⁾, were cited.

LORD HATHERLEY: My Lords, this case turns upon a very short question, namely, whether or not in directing a jury, the jurors were misdirected by the learned Lord Chief Baron who tried the case, and as to whose direction a bill of exceptions was tendered, which he signed. It is 491] *greatly to be regretted that in determining this case, which, probably, all things being considered as regards the findings and the other parts of the case, is not of so much importance as one might otherwise have supposed—I say it is greatly to be regretted that we have so meagre and imperfect an account of the summing-up. I can hardly believe that what we have in the papers before us is all that was said on the occasion. At the same time, if it be not all, there was an opportunity given to the learned judge who signed the bill of exceptions to add to it and have it put into proper shape, and we are obliged for the purposes of this case and upon this hearing, to assume that we have everything before us which ought to lead us to a conclusion.

That being so, my Lords, the question which arises is this: An insurance was effected by the plaintiff in the action upon the life of a person of the name of Robert Nutt, and the insurance money was claimed as upon his death by the plaintiff in the action (the defendant in error) from the Prudential Assurance Company, who are plaintiffs in error. Of course it was the duty of the plaintiff in the action to establish as such plaintiff, the fact of Robert Nutt being dead, before he could claim the insurance money upon his life. The course the plaintiff then took was to prove that upon inquiry amongst the relatives and friends of Robert Nutt he had not been able to learn any tidings of him, and that none of the family had heard of him for a space of seven years past, upon which, if the case rested there, if recourse had really been had to all the family whom the

⁽¹⁾ 5 B. & Ad., 86 (S. C., *nom. Doe d.* see also *Hickman v. Upsall*, Law Rep., *Slade v. Nepean*, 2 Nev. & M., 219), 20 Eq., 136.

2 M. & W., 894. As to presumption of ⁽²⁾ 6 East, 80, at p. 85.

death and the time of its happening, ⁽³⁾ 4 B. & Ald., 433.

⁽⁴⁾ 15 Q. B., 756.

court might conceive proper to be inquired of in respect of such a matter, and if none of them had heard or known anything of Robert Nutt for the space of seven years, the presumption of his death would have arisen. I do not think it necessary or important in the present inquiry to determine the precise words in which the law should be laid down as to this absence of knowledge. If we look to the analogy of the various acts of Parliament, which, on various occasions, have been passed for the purpose of laying down that rule of presumption, I think in all those instances to which we have been referred, the expression is, if the party "had not been known to be alive" during that time. The learned judge here has laid it down, and it does not seem to have been questioned in the Court of Appeal, that if the relatives had heard of *the person as being living whose death [492 was in question, that would have been sufficient to rebut the presumption. I am willing to take it to be so for the purposes of the present inquiry. I do not think in the present inquiry it would make any difference.

Different members of the family were called as witnesses, and I think I may state very briefly what the result of the evidence came to be. Several witnesses were called, who, when you take the whole of their evidence into consideration, say this: Robert Nutt was our relation; we heard of him last more than seven years ago; we have never heard anything of him since, except that we were informed by one of the family, a Mrs. Chrieman, that she had in a distant country, in Australia, seen this man who was her uncle; that she had said, that upon a particular occasion she saw in Melbourne a man passing by "whom she recognized as her uncle Robert Nutt, he was well dressed and apparently well-to-do, and resembled her uncle as she remembered him in Cheltenham; that she did not speak to the man because he was lost in the crowd as she turned to do so; and that she had on returning to England in 1873 told all her relations in Cheltenham that she had seen her uncle Robert Nutt." I read the evidence of the different witnesses as saying, We never heard of him except by this information.

The jurymen before considering their verdict stated to the learned Lord Chief Baron, as appears in the case put before us, that they did not consider that the evidence of Mrs. Chrieman was conclusive that it was her uncle Robert Nutt whom she had seen. Thereupon the defendants called the mother of this Mrs. Chrieman and also Mrs. Chrieman, junior, herself. The mother said that her "daughter had written to her a letter in which she stated that she believed

that she had seen her uncle Robert.” It appeared that “no inquiries were made in Melbourne by Mrs. Chrieman, junior, or by the other relations, for the purpose of tracing the person supposed to be Robert Nutt.” I think I may fairly represent the evidence to come to this: none of the relations except Mrs. Chrieman had seen Robert Nutt for seven years, and none of them had heard of him during those seven years, except so far as they had heard of him from her; and in reality the case may be reasonably stated as being 493] one which turns wholly on the *evidence of Mrs. Chrieman. There is, first, the question whether she was to be believed as honestly stating that she saw her uncle? I see no reason, so far as anything appears in the proceedings, for thinking that she was not honestly stating that; her writing to her mother seems as if she believed, at least, what she was saying. And there is, also, the question whether she might not be mistaken in supposing that she had seen her uncle, as to whom she made no farther inquiry.

My Lords, in that state of the case the counsel for the plaintiff asked (and this is very important) “the Lord Chief Baron to direct the jury that there was evidence that Robert Nutt had been absent for seven years without being heard of, and that he had not been heard of, if Mrs. Chrieman, junior, was mistaken in believing that she had seen him; and that if the jurors were satisfied, from the improbabilities of the case or otherwise, that Mrs. Chrieman, junior, was mistaken in believing the said person seen by her in Melbourne to be Robert Nutt, then the said Robert Nutt might be presumed to be dead, having been absent for more than seven years without being heard of.” Now, I apprehend that that mode of putting the case to the jury, which the learned counsel so asked the Lord Chief Baron to adopt, was a perfectly correct mode of stating it, and that, in truth, the case did turn upon this, and wholly upon this, whether Mrs. Chrieman was to be trusted or not in the account which she gave of having seen her uncle. If the jurymen were satisfied that she had seen him, without mistake in judgment or disposition to state a falsehood, there was an end of the case at once. If, on the other hand, the jurymen, for this was a question entirely for the jury to determine, came to the conclusion that she was mistaken, and that she had not seen Robert Nutt, then, also, the case was at an end, for the other relations who gave evidence had never heard of him for seven years. They said they had not heard of him apart from this statement, which they disbelieved. They said they did not think this statement to be a correct state-

ment, and they were not satisfied by it; and, certainly, if the jurymen came to the conclusion that it was not to be depended upon, they would be justified in saying that the man had not been heard of for seven years. Therefore, the question as to the presumption of death in this case appears to me clearly to stand in this way: If, *on the one [494 hand, the evidence of Mrs. Chrieman was believed, there was clear and distinct evidence that the man was alive within seven years, and there was an end of the case. If, on the other hand, it was not believed that what she stated was a correct statement of fact, then there was clear and indisputable evidence that the relations had not heard of him within seven years in any way in which the term "heard of him" could be reasonably understood and applied; that is to say, as meaning something more than a hearing of that which could be treated, as they did treat it, as inaccurate—a piece of mere gossiping suggestion. If the jurymen took that view of it, they must be held to have been justified in coming to the same conclusion as the relatives did, and the result would be that Robert Nutt had never been heard of at all for seven years. Only one person came forward and said that she had seen him, and she had not heard of him otherwise. On the other hand, every other member of the family who was called in the case had never seen him for seven years, and had never heard of him except by this statement, which, if disbelieved, the jury would be bound to say that he had not been heard of.

Now, my Lords, the learned Chief Baron directed them thus: "Not being heard of means this, that no member of the family has heard anything about him which might raise a reasonable doubt in their minds whether he must have been no more." I will not stop to criticise that particular expression. I agree with the learned judges in the court below, that it is not fair to criticise every line and letter of a summing-up which has been delivered by a judge in trying a case, especially where there is a somewhat imperfect record of it. But he goes on to say: "You cannot say that a man has never been heard of when, in the first place, one of his nearest relations comes and says she saw him alive and well within three years; still less can you say that he has never been heard of, when every member of the family states that they heard that which is now stated." There, my Lords, as it appears to me, a difficulty arises as to the direction given by the learned Lord Chief Baron to the jury. As far as I have read his direction, it seems to me to come to this: in the first place, if the jurymen believed Mrs. Chrieman's

assertion to be correct, and thought that she had seen him 495] alive and well, of course that ends *the case. But then he adds, "Still less can you say that he has never been heard of when every member of the family states that they heard that which is now stated." Now, as far as that extends, if it remained there, there would have been great reason for the jurymen to infer from that direction that it would be impossible for them, whatever might be the value of Mrs. Chrieman's evidence, to consider the presumption as arising when every member of the family had heard what she said, because, be it true, or be it not true, the fact of their having heard it would prevent the presumption arising.

I think that would be the reasonable inference from that language; but I think it becomes clearer, as you go on, that that would be the interpretation that would force itself upon the mind of the jury, because what the learned Lord Chief Baron goes on to say is this: "You cannot have any one called before you who saw him die, or saw him buried. You have therefore no direct evidence except the evidence that he was alive two or three years ago; on the other hand, you have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of the relatives has come forward, and every one of the relatives heard that he was alive." Therefore it appears to me that the Lord Chief Baron plainly and distinctly directed the jurymen that they had no evidence before them at all upon which the presumption of law could arise, because the presumption of law requires that those relatives should not have heard of him, and you find that all those relatives did hear of him. Of course, in reality that turns upon whether they believed Mrs. Chrieman or not, and whether the relatives having heard of him from her, they were bound to accept that as knowledge, and so the presumption of death should be disposed of. On the other hand, my Lords, I apprehend that that is not the law at all. That would not be such a hearing as could lead you to a reasonable ground for believing that the man was alive within the epoch. I apprehend, my Lords, that the jurymen are not here directed, as it appears to me they ought to have been, that the evidence given by the members of the family as to not having heard of him was fit to found the presumption upon, if they came to the conclusion that Mrs. 496] *Chrieman's story was not to be believed. On the contrary, it seems to have been laid down in clear and pre-

cise terms that if every member of the family has heard of him, whether by a credible story or not, then there is a probability of his being alive and the presumption of death would not arise.

The learned Lord Chief Baron goes on to say: "I, for myself, looking to the whole of the case, not only can see no evidence upon which you would be justified in finding that he was dead, but the very ground of the presumption, which sometimes arises, of death from a man having disappeared, and then never having been heard of for seven years, is entirely removed by the most positive and direct evidence." What evidence? Not that he was alive, but "that every relative he had at Cheltenham, or, so far as we know, in the world, has heard that he was alive." So that there again the jurymen are told, and as it seems to me emphatically told: When you find the whole family declaring that, in this way, they have heard that he was alive, there is nothing to justify the presumption of death, every ground for the presumption which sometimes arises has disappeared. Then he proceeds to use an expression which was commented upon by the learned counsel in the short and able argument, all the abler perhaps because it was short, which was addressed to your Lordships yesterday. We come now to a part of the summing-up which approximates to informing the minds of the jurymen a little more of what their function was. He says: "Then when you come to ask yourselves the question" (that assumes, of course, that they had to determine the question) "whether what they heard was what ought to have satisfied them at the least that he might be alive, you have before you a person on whom no one pretends to cast any reflection, whatever may have been the language in which she made the communication she made to the relatives, who now states positively on her oath that she has no doubt on the subject, and that she saw him and knew him, and that it was her uncle Robert Nutt." That, coupled with the preceding part, I am bound to say, was the only part which made me feel any hesitation in the conclusion that I have come to. That seemed to indicate, although I told you (the jurymen) that there was no presumption whatever in consequence of the relatives having heard this, there yet remains the question to *ask yourselves whether [497 what they heard ought to have satisfied them. If that stood alone without the passages coming before and after it which I have read, or am about to read, I should have been disposed to come to the conclusion that the matter had been properly left to the jurymen, and that they might have ar-

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rived at the consideration of whether or not they believed the evidence of Mrs. Chrieman, or whether or not her statement was such that it ought to have induced the other relatives to believe that the man was seen within the particular epoch.

But, my Lords, observe what the Lord Chief Baron says as concluding the whole: "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove directly the contrary" (that is, of course, that Mrs. Chrieman had seen him), "and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendants." Now the evidence was not absent, the evidence was all present of his not having been heard of in that time, for all the relations say they never did hear of him except in this particular way, which they did not believe—whether they were right or wrong in that is another question. Therefore, the learned judge having used the strong expressions which I read at the beginning about the absence of all evidence, again repeats here that there is no evidence whatever upon which a presumption could arise; he says, "in the absence of that evidence upon which alone the presumption should be raised."

Upon that, my Lords, I come to the conclusion which was so well expressed, I think, by Mr. Baron Pollock: "It may very well be that the jury, upon the particular words used by the Lord Chief Baron, may have thought, quite apart from the credibility of this witness, they were bound, by reason of the relatives having heard something at Cheltenham, to act upon the question of presumption, which, as I have said before, is a question of mixed law and fact." I confess, my Lords, it appears to me, with these passages which I read from the summing-up, and from the concluding passage, that the impression left upon the minds of the jurymen would necessarily be that they had no evidence whatever before them upon which the presumption could
498] arise, in *consequence of the relatives having heard that statement, which might reasonably have led them to the conclusion that Robert Nutt might be alive, if what Mrs. Chrieman said was true. My Lords, I confess, looking at the whole case, and having regard to what has been found on other parts of the case for the defendants, I regret extremely to be obliged to come to this conclusion, for I am afraid we are not in any degree assisting the parties in arriving at a very helpful arrangement as to their rights. Unfortunately your Lordships are, I believe, divided in opinion

on this subject, but I can only express my own opinion, which I confess I have come to, not so much with hesitation as with regret; and if the result should be that your Lordships should be equally divided, of course there will be no reversal. Following the precedent of a former case, I shall not be disposed to advise your Lordships to give costs of the appeal in such a case.

LORD O'HAGAN: My Lords, I confess that in this case I am not able to concur with my noble and learned friend. I need not say that I feel the greatest diffidence in any case where I happen to take a view different from his, and I feel it equally in differing from the view which I believe is taken by my noble and learned friend opposite (Lord Blackburn) of this case. I have come to the conclusion that the judgment of the court below ought to be reversed. I will add that I have the greater difficulty in this case, because, on looking to the judgments delivered in the court below, I find that the learned judges may substantially be said to have been equally divided there also. The Lord Chief Justice of the Common Pleas, although formerly he accepted the opinions of his colleagues, substantially differed from them upon the point, so that we have on the one side the Lord Chief Baron and the Lord Chief Justice of the Common Pleas, and on the other side the Master of the Rolls and Mr. Baron Pollock, and both of those who have affirmed the judgment of the court, have affirmed it with an expression of the strongest hesitation upon a consideration of the case.

My Lords, I confess that I concur very much with the observations which were made by those learned judges as to the unfortunate manner in which this case is placed before us. We have a *bill of exceptions, which sets out a [499] few sentences out of a long summing-up (we are informed by the learned council that it extended to beyond an hour in the delivery), and we have those sentences strung together in such a way that they are not everywhere perfectly intelligible. The misfortune of that is, that we really cannot have any assurance that we have before us the words, in their collocation and effect, which the Lord Chief Baron actually used to the jury. I concur also, my Lords, with the view of the learned judges in the court below, that in dealing with a bill of exceptions of this sort, especially such a bill of exceptions as is before us now, we ought not to be hypercritical with reference to the judge. It is quite true, as my noble and learned friend has said, that we are bound within the four corners of this bill of exceptions, and if the judge or the counsel had any desire to add anything to the bill of

exceptions, it was perfectly competent to them to do so before it was signed. But, on the other hand, we cannot shut our eyes to the fact that this is a most imperfect record of what passed at the trial; and therefore at once we must not be hypercritical in regard to the judge, and we must be slow to disturb a verdict which was pronounced deliberately by a special jury of the county of Surrey, presided over and addressed by a learned judge of such great experience, and coming to this conclusion upon the evidence placed before them. If we see clearly that there was misdirection in the case, and that the jurymen were misled, directly or indirectly, by the learned judge, our bounden duty is to disturb their verdict; but if we do not see that clearly and distinctly we should rather lean to a maintenance of the verdict than to a disturbance of it.

My Lords, I need not say that we have nothing to do in this case with the weight of evidence. Nor have we anything to do with the particular form of expression in which the learned judge addressed the jury. I am free to say that the expressions used by the learned judge were very strong indeed, and I am not indisposed to admit, with one of the learned judges of the Court of Appeal, that the jurors may to some extent have thought those expressions strong enough to coerce their judgment upon the question before them. But it does not at all follow from that, that we are to allow 500] the bill of exceptions. I myself have had *some practical experience as a common law judge, and I know that some judges have thought it right to balance the evidence on questions which juries have to consider on the one side and on the other, and to leave the jurors, who are constitutionally the judges of fact, to draw their own conclusions; but I am aware, also, that other judges, and I should infer from this bill of exceptions, although I know nothing of his practice otherwise, that the learned Lord Chief Baron is one of them, who think it to be their duty to direct the juries as well as they can upon questions of fact as upon questions of law; not to coerce them, but to give expression to their own opinions in clear words, and if those expressions of their opinions in clear words do lead the jury to conclusions in accordance with the conclusions of the learned judge, the judge is the better pleased with that, and very often the jurymen are none the worse for it. Therefore, although there are very strong expressions in this charge, yet inasmuch as the reference of a matter to the judgment of the jury must very often be an understood reference and not an expressed reference, I take it that upon the whole that is no

ground upon which we can set aside the verdict or maintain the bill of exceptions.

Now the question is, what did the learned Lord Chief Baron say to the jury? Manifestly the real question in the case was a single question. The plaintiff insisted upon the legal presumption of the death of Robert Nutt after a certain number of years. The answer of the defendants was, We do not deny the number of years which have passed, and all that, but we call a witness to prove that the person alleged to be dead, this Robert Nutt, was alive two years ago. That was a question for the jurors, and if that question was left to the jury, and if the jurors, when they had that question left to them, found their verdict accordingly, we have no right to interfere with that verdict at all. The solitary question we have to determine in the case is, did the Lord Chief Baron leave to the jury the question as to the veracity and the accuracy—I may say mainly the accuracy—of Mrs. Chrieman's testimony? If he did leave that question to the jury, then I say that his direction to the jury ought to be maintained by your Lordships.

Let us see what he really did say upon the matter. I begin *with the statement of "the jury through their [501 foreman" "to the Lord Chief Baron in the course of the case that they did not consider that the evidence of Mrs. M. L. Chrieman was conclusive that it was her uncle" whom she saw. Now I observe upon that, that that single circumstance indicates the jurymen's full appreciation of their power and their duty in the case. They knew it to be cast upon them to determine upon this question, and they knew precisely the question they had to determine. What followed upon that? They expressed a doubt. Then the learned counsel, whose interest it was to uphold the testimony of this woman, produced her mother, "who stated that her daughter had written to her a letter, in which she stated that she believed that she had seen her uncle Robert." I do not know how it came to pass that that letter was admitted in evidence at all. It appears to me not to be evidence. There are certain very exceptional cases in the law, especially in the criminal law, in which the statement of a person immediately after a transaction has occurred, is permitted to be given in evidence for the purpose of affirming the accuracy and the truthfulness of the other evidence given. That is the case in the instance of rape, and in the instance of felonious assaults, and some other, but very few, cases in the whole range of the law. I confess if I had been trying the case I do not think I should have admitted this particular

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piece of evidence at all. I do not think it was evidence; but it was admitted, and, being admitted, it was morally persuasive although legally exceptionable. It was very morally persuasive if, in a letter so produced, the woman immediately after the period when she said that she saw her uncle, made a clear, coherent, probable, and seemingly truthful statement to her mother; and when they got the evidence before them, no doubt that very naturally operated much upon the minds of the jurors, and led them to the conclusion which they afterwards affirmed by their verdict that this woman had seen her uncle.

Then the counsel for the plaintiff called upon the Lord Chief Baron to give a specific direction to the jury "that there was evidence that Robert Nutt had been absent for seven years without being heard of, and that he had not been heard of if Mrs. Chrieman, junior, was mistaken in believing she had seen him, and that if the *jury were satisfied, from the improbabilities of the case or otherwise, that Mrs. Chrieman, junior, was mistaken in believing the said person seen by her in Melbourne to be Robert Nutt, then the said Robert Nutt might be presumed to be dead." Now, in the hearing of the jury the learned counsel made that very proper appeal to the judge, and by so doing informed the jurors, as the judge, I think, substantially informed them afterwards, that it was their province, and not his, to determine whether Mrs. Chrieman was right or wrong, whether she was mistaken or correct in what she said upon this matter.

I pass on, then, to what the learned Lord Chief Baron actually said. There is no controversy raised upon the first sentence. I think my noble and learned friend now on the woolsack, although he criticised it more or less, did not make any objection to this first sentence with regard to what "heard of him" means. He goes on to say, having defined the nature of the presumption, "You cannot say that a man has never been heard of when in the first place" (now observe this) "one of his nearest relations actually comes and says she saw him alive and well within three years." If it had stopped there, beyond all doubt there would have been no controversy about the matter, at least I think there ought to have been none. He says: "You cannot say that a man has never been heard of when, in the first place, one of his nearest relations actually comes and says she saw him alive and well within three years; and, he adds, "still less can you say that he has never been heard of when every member of the family states that they heard that which is now stated." Now, no doubt, if that stood alone it would

be exceptionable; but in my opinion you must take the whole sentence together. You must take the reference to the existence of the man as proved by the woman, and you must take the belief of the family as founded upon her statement, which the jurymen were required to declare to be right or wrong. Taking the two together it does not appear to me to be an unreasonable conclusion that the jury, after listening to that charge, would not have hesitated to say, It is our duty first to determine whether we believe Mrs. Chrieman to have been mistaken or not. I confess for my own part, although I admit that there is some confusion in the case as to this part of it, and I admit that that naturally *produces the diffidence and hesitation which every [503 one who has been connected with the judgment of this case has declared he has felt, still, looking at it as a matter of common sense, and taking the whole of this sentence together, I think the jurors must have seen that it was their primary duty in the first place to determine as to the credibility and correctness of Mrs. Chrieman's statement.

Then the Lord Chief Baron goes on: "You cannot have any one called before you who saw him die or saw him buried." That is not so very clear, but it does not touch the case. Then he says: "You have, therefore, no direct evidence except the evidence that he was alive two or three years ago." Now no doubt that looks very like an assumption by the Lord Chief Baron that that evidence was infallible evidence, and was to be accepted; but you must take that in a reasonable way, and take it in connection with what follows afterwards. What he says substantially is this—there is direct evidence, if you believe it, that he was alive two or three years ago. And then he goes on: "On the other hand, you have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of the relatives has come forward and every one of the relatives heard that he was alive in 1872 or 1873." Now how did they hear that? Merely through Mrs. Chrieman. She was the only channel of information on which their hearing was founded at all, and the same observation, if there was any force in it, that I have made about the antecedent sentence will apply equally to this. Then he goes on to say: "I, for myself, looking to the whole of the case, not only can see no evidence upon which you would be justified in finding that he was dead," that is to say, if you believe this woman; I believe her, and therefore I see no evidence that

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he was dead ; I see evidence directly to the contrary, “but the very ground of the presumption, which sometimes arises, of death from a man having disappeared, and then never having been heard of for seven years, is entirely removed by the most positive and direct evidence that every relative he had at Cheltenham, or, so far as we know, in the world, has heard that he was alive.” Again I say if that stood alone the mere hearing that he was alive would plainly not 504] be evidence *upon which the jury could act in the case at all ; but when you connect that with the statement that they had heard he was alive from a woman whose accuracy and correctness at that moment they were to determine on—putting the two things together it appears to me quite possible (and that is sufficient to say) that the jurors may not have been misled at all by the collocation of words which may be unhappy, may be inartistic, and may be obscure, but which I do not think in any way necessarily led them to an erroneous conclusion.

Having got so far it appears to me that what remains, I do not say makes it clear, that is impossible after what we have heard from my noble and learned friend, and from the learned judges of the court below, but gives color and reason to the view which I feel myself compelled to take of the case: “Then when you come to ask yourselves the question, whether what they heard was what ought to have satisfied them, at the least that he might be alive.” What is the meaning of that? “What ought to have satisfied them,” that is to say, was it a true statement made by a woman who actually saw the thing to which she was prepared to depose. “You have before you a person on whom no one pretends to cast any reflection, whatever may have been the language in which she made the communication she made to the relatives, who now states positively on her oath that she has no doubt on the subject.” Now I pause there. The learned Lord Chief Baron says that the jurors have before them a person unimpeached by any one, and they were to consider manifestly whether they held that woman unimpeachable, not only in integrity but also in accuracy of statement. He put before them that woman as the subject-matter of their inquiry upon the occasion. And not only so, but he shows by the succeeding words that the question of her correctness has been made a substantial question before the jury, before that period of the trial. The question arose when that letter was produced by her mother. It is one of the great misfortunes of the case that we are in darkness about all the facts, but I take it that

that letter had been alleged to be discrepant with the statement which she made when called as a witness. That may have been the case, but the value of it is to show before the jury the accuracy of that woman by a comparison with her *letter. That question had been before the jury, [505 and was considered by the court and the jury, both, to be the real question for their determination.

The Lord Chief Baron continues: "Whatever may have been the language in which she made the communication she made to the relatives, who now states positively on her oath that she has no doubt on the subject, and that she saw him and knew him, and that it was her uncle Robert Nutt." My noble and learned friend I think has very truly said that if that stood alone it would be scarcely possible to impeach the charge. It does not stand alone unfortunately, and therefore the controversy arises, but I read it as throwing a light back upon what went before, and as concentrating the attention of the jurors upon that which had previously been put before them in a scattered way, and clearly suggesting to their minds the very issue upon which they were required to determine, taking away from them any excuse for assuming any other issue than the real one, which was the correctness and the veracity of this woman. That was the question put ultimately in these words by the learned judge to the jury, and I think I am not wrong in saying that I may interpret what went before, as the jury probably did interpret and ought to have interpreted what went before, as making clear that which was obscure, and plain that which was doubtful.

But my Lords the matter does not rest there. It appears to me, I confess with the greatest deference to my noble and learned friend on the woolsack, that the last sentence is of equal force in support of the view which I venture most humbly to suggest to your Lordships. It is this: "Under these circumstances, unless you are prepared to find that he was dead in April, 1875." Who are to find? And what are they to find? The jurymen are to find whether the man was alive or dead in April, 1875. They are to find that, and although the judge has said, and said in a very magisterial and peremptory way certainly, what he thought about it, he at the end of the case tells them what he was constitutionally bound to tell them, namely, that they, and they only, were at liberty to find anything upon the subject. He goes on after saying, "unless you are prepared to find that he was dead in April, 1875," to say, "and find it upon evidence which tends to *prove directly the contrary, [506

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and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendants." What is the meaning of that? It is in my opinion substantially what had been said by the antecedent clause. When he says, "in the absence of that evidence," that means in the absence of evidence of not hearing of the man, or the man's existence, you would be able to make that presumption, but you cannot do that because there is no such evidence of want of hearing of him, for, if you believe this woman, Mrs. Chrieman, the man was seen two years ago, and, therefore, if you believe her, there could be no presumption of death at all.

My Lords, as I have said, I have felt the greatest difficulty in the matter. I have great doubt considering the difference of opinion there has been here and elsewhere; but upon the whole it appears to me that the learned judge did substantially, although in obscure and imperfect terms, put to the jury very much the question expressed as the proper question by the Master of the Rolls, who (it is worthy of observation) says he does not impeach any particular part of this charge; he does not pick out any sentence or any words, but, reading the whole of it, the impression on his mind is so and so. I am not clearly of opinion that that is precisely the way in which one ought to deal with a bill of exceptions. I rather think it is not. But be it so or not, the way in which he states the question which should have been put to the jury is this: "If you think that Mrs. Chrieman was mistaken, then the man has not been heard of—if you think she was not mistaken, but she did see her uncle, then he has been heard of, and that is the question for your consideration." I may be right, or I may be wrong, but I have read this bill of exceptions over as often as the Master of the Rolls since we heard the argument yesterday, and I have come to a directly opposite conclusion. I think that substantially that was the question which was put to the jury, and I have no moral doubt in my mind that the jurors, who at the beginning of the case had applied their minds to that very question, and considered that question, and had afterwards modified their opinions upon that question, had, at the end of the case, that question fairly before them, and 507] came to a deliberate *conclusion upon it. That conclusion was to defeat the plaintiff, and I think the plaintiff ought to be defeated. I believe my noble and learned friend at my side (Lord Gordon) is of my opinion, and therefore we are equally divided, and the judgment must stand, but I think with my noble and learned friend on the

woolsack that with a view to uphold a decision we came to last session there should be no costs of the appeal.

LORD BLACKBURN: My Lords, I also regret that upon the construction of this inartificially drawn bill of exceptions there should be a difference of opinion among your Lordships. I take it that the Court of Appeal having held upon this bill of exceptions that there should be a *venire de novo*, if your Lordships are equally divided, as I believe you are, the result of the judgment will not be disturbed, but that no costs will be given of the appeal to this House.

My Lords, I now proceed to say why, as far as my opinion goes, the judgment of the Court of Appeal ought to be affirmed with costs. I think it was right. I take it that when there is a case tried before a judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them. Farther than that, it is not necessary for him to go. It is a mistake in practice, and an inconvenient one, which very learned judges have fallen into, of thinking it necessary to lay down the law generally, and to embarrass the case by stating to the jury exceptions and matters of law which do not arise upon the case. That is not the duty of the judge at all, and I think it is better not to do it. So far as a statement of the law is necessary to give a proper guide to the jury upon the case, the judge should state it; and, although it is generally said, and said truly, that non-direction is not a subject of a bill of exceptions, yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be a subject for a bill of exceptions and would be a ground for a *venire de novo*. When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect *in not giving the right guide to the [508 jury, when the facts were such as to make it the duty of the judge to give a guide, we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo*.

My Lords, in the present case I feel some regret in saying that there should be a *venire de novo*, for as far as I can make out the case, the verdict was quite right. But I cannot help that; if an improper direction has been given, a wrong guide has been given to the jury. That raises the question upon the construction of the bill of exceptions—

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what was the direction given by the learned Chief Baron to the jury? Was it right, or was it either wrong as giving a wrong guide, or imperfect as not giving a right guide, when the circumstances made it his duty to give the jury a guide? The question comes before us upon a bill of exceptions, and that is a very inconvenient mode, and it is now a very unnecessary mode of raising it. At the time when the statute under which the bill of exceptions proceeds was passed, now four or five hundred years ago, there was no way of bringing error upon a misdirection of a judge at *Nisi Prius*, and therefore it was directed that when he gave his direction the counsel if they thought it erroneous might take exception to it, and if one of the counsel did so it was necessary for him to state it: [His Lordship stated the ordinary proceedings on a bill of exceptions, and remarking on what had been done in this case, said that it was "essential that exception should be taken before the verdict was given."] We must now take the bill of exceptions as it is, and look at the whole bill of exceptions and see, has or has not the Lord Chief Baron upon that bill of exceptions and according to the statement therein contained, done (whether he actually did it or not we do not know) what he ought to have done, or has he failed in his duty to give the jurymen a proper guide in law to enable them to determine the question which was before them?

Looking at the bill of exceptions as it now stands, we find the facts to be these: Robert Nutt's life was insured; the question was, was he to be considered as dead or not? The plaintiff had failed in proving the actual death of Robert Nutt, and then he relied upon the rule of law which is generally laid down in something *like these terms; if a man has not been heard of for seven years that raises the presumption that he is dead. It is generally so enunciated. I do not say that that is the correct way of enunciating it, but I think it may be fairly enough put in those words for this purpose. I think, having regard both to the reason of the thing and the decisions, we must take "not being heard of" in a certain sense. There was seldom or never a man who had reached the age of forty with regard to whom it would not be easy to call scores of people to say, "I was at school with him, I knew him perfectly well, and I have not heard of him for the last seven years." But that would not be enough to raise a presumption that he was dead, because, if ever so much alive, those people might not have heard of him. My Lords, it appears from the case of *Doe v. An-*

drew (¹) that it is necessary, in order to raise the presumption, that there should have been an inquiry and search made for the man amongst those who, if he was alive, would be likely to hear of him. Perhaps it is not quite an analogy, but it is something like the case of a search for documents; before you are allowed to give secondary evidence of a document you must search the places where the document would in the natural course of things be, if it were still in existence; and, having proved that you have done that, you may then give your secondary evidence. In like manner, in order to raise a presumption that a man is dead from his not having been heard of for seven years, you must inquire amongst those who, if he was alive, would be likely to hear of him, and see whether or no there has been such an absence of hearing of him as would raise the presumption that he was dead.

In this case the plaintiff undertook to do that, and called first a witness who said so, but afterwards said that he "had heard a report that a Mrs. Chrieman had seen him" in Australia, but that he did not believe it. I am inclined to think that having heard a report would hardly be such a matter as would prevent the fact of the witness saying he had not heard of him being evidence as far as it went. The next witness states that she had not heard of Nutt since he left Cheltenham, but that Mrs. Chrieman had told her that she believed she had seen him in Melbourne. There the plaintiff's case ended. Had the objection then been *taken, [510 This does not raise the presumption, for, when you make a search among those who, if he were alive, would have been likely to hear of him, as to whether he had been heard of or not, it appears that Mrs. Chrieman did say that she had heard of him—that she had seen him—and then the presumption would not arise. The proper ruling, if that objection had been taken at the end of the plaintiff's case, would have been, there cannot be said to have been no hearing of him for seven years, for Mrs. Chrieman says she saw him, and I think that would be a hearing of him in every sense of the word. The plaintiff might have met that by calling Mrs. Chrieman, to prove, if so he could, that although she had said she had seen him, that was founded on a mistake. If that could have been done, I think it would have been open to the plaintiff to do so. I dare say the learned counsel for the defendants judged very wisely upon the matter; instead of making a captious objection, to compel the plaintiff to call Mrs. Chrieman the younger, he said I will call

(¹) 15 Q. B., 751.

her myself. I know what she is going to say, and it will be better for me before the jury that I should do so. He was very discreet, probably, in so doing. The defendants having called her, she says she was fifteen years old when Robert Nutt left Cheltenham, and that in December, 1872—that is, four or five years afterwards—she being then twenty years old, “when she was standing in a crowded street in Melbourne, in Australia, a man passed her whom she recognized as her uncle Robert Nutt; that he was well dressed, and apparently well-to-do, and resembled her uncle as she remembered him in Cheltenham; that she did not speak to the man, because he was lost in the crowd as she turned to do so; and that she had, on returning to England in 1873, told all the relations in Cheltenham that she had seen her uncle Robert Nutt.”

Then a juryman stated a thing which occurred to him. He stated “to the Lord Chief Baron that they [the jurymen] did not consider the evidence of Mrs. Chrieman was conclusive that it was her uncle” Robert Nutt whom she had seen. No doubt they were quite right. It was evidence that the man she saw in Melbourne was her uncle, subject to the remark and observation that she, who had known him well when she was a girl of fifteen, just seeing or getting a glimpse of a man in a crowded street in Melbourne was 511] *more likely to be mistaken than not. That was a fair argument for the jury.

Supposing the jurymen had found as a fact that they thought she was mistaken, would or would not the grounds have existed upon which the presumption from a seven years’ absence would arise that the man not heard of was dead? I think certainly they would. It seems to me that when she said, “I have seen the man in the streets of Melbourne,” it upset the presumption arising from the relatives, including herself, never having seen or heard of him, and it turned the *onus* the other way. It was possible, however, that it might have been proved that the man she saw was not Robert Nutt, but somebody else. If that had been proved, it would have left the matter just as if she had never made that statement. When she said she thought she had seen him, and all the others had heard it from her, although that unexplained and uncontradicted statement affected the *onus*, yet, as soon as it was made out by satisfactory evidence that she was mistaken, the hearing from her was gone, and the presumption would remain as it was before.

Now, my Lords, of course it is essential for the purpose of saying whether the proper direction was given by the

judge or not to see what the proper direction would have been, and then to see if that which would have been the proper direction was given to the jury. I think jurymen who were not lawyers—nay, I think many lawyers themselves—would be under the impression that the commonly enunciated rule about a man's not being heard of for seven years, would mean that there has not been a physical hearing of him, and that if the relatives had been told of something which happened within the seven years, from which they believed that he was alive, that would be a hearing of him, and that would put an end to the presumption, though it might be proved that the information so brought to the relatives was positively untrue. I cannot think that, but they might think it. They might imagine that the rule of law was absolute and positive, that hearing was enough. If that be so, I take it that it is clear that the Lord Chief Baron ought to have given them a direction that in the event of their coming to the conclusion, whether rightly or wrongly, that Mrs. Chrieman was mistaken when she said she saw her uncle, and that she did not see him, then there *was an absence of ground for believing that he was [512 alive within the seven years, the period sufficient to raise the presumption.

Now, my Lords, the question comes to be, did the Lord Chief Baron give the proper direction to the jury or not? That depends altogether upon what we find in the bill of exceptions. It is certainly an unlucky thing that it is artificially drawn up, and that we have only a fragment, apparently taken out of the shorthand writer's notes, of the learned Chief Baron's summing-up; but if there were other passages which would have qualified these, the learned Chief Baron and the counsel for the defendants ought to have taken care that those passages were introduced, and that any necessary corrections were made in the bill of exceptions. We can but deal with the words as we have them.

My Lords, it is of considerable importance to observe that, although it is put in the wrong place in the bill of exceptions, it does appear that the counsel for the plaintiff did put the right point to the judge. He said to the judge, and said it in the hearing of the jury, that the jury ought to be told that if they "were satisfied, from the improbabilities of the case or otherwise, that Mrs. Chrieman, junior, was mistaken in believing the person seen by her in Melbourne to be Robert Nutt, then the said Robert Nutt might be presumed to be dead, having been absent for more than seven years with-

out being heard of." Such, I think, undoubtedly was the true proposition of law, and the jury heard the plaintiff's counsel say that. We are not told in the bill of exceptions what the defendants' counsel urged to the contrary. Probably they did not assent to that being the law, but said something else, but what it was we do not know.

Now what are the jurymen told? They are told, "not being heard of means this, that no member of the family has heard anything about him which might raise a reasonable doubt in their minds whether he must have been no more." I do not think that in the circumstances that is strictly correct, because I think though it might raise a reasonable doubt, which would, of course, shift the presumption, yet the facts might be made clear the other way, and it might be shown that the reasonable doubt was not well founded as in this supposed case: if a respectable person came and said, your brother, whom you think to be dead, 513] is alive; I saw *him, and spoke to him yesterday; every one must feel that that would raise a reasonable doubt, and that, if undisputed, it would put an end to the effect of the seven years' presumption. But supposing the other side should be able to call witnesses to satisfy the jury that the person who thought that he had seen him was quite mistaken, was deceived, the relatives having previously believed that the man who had told them he had seen the brother was telling them the truth, could it be said, after it was proved that the man who told them that, had been cheated into the belief that he had seen the brother, could it be said that that evidence, so explained, put an end to the presumption arising at the end of seven years? I apprehend not; yet the wording of the Lord Chief Baron in the first line might have led the jury to think so; and I must acknowledge that when I read the whole through, I think it did lead the jury to think so—whether so meant or not.

The Lord Chief Baron says: "not being heard of means this: that no member of the family has heard anything about him which might raise a reasonable doubt in their minds whether he must have been no more. You cannot say that a man has never been heard of when in the first place one of his nearest relations actually comes and says she saw him alive and well within three years, still less can you say that he has never been heard of when every member of the family states that they heard that which is now stated." If he had gone on, and said, but if the foundation of that statement is disproved, of course it will go for nothing, it would have been correct. He certainly does not

in words say that. We will see what he does say. He says: "You cannot have any one called before you who saw him die or saw him buried. You have therefore no direct evidence except the evidence that he was alive two or three years ago." Of course, if it was believed that he was alive two or three years ago all presumption was at an end. "On the other hand, you have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of the relatives has come forward, and every one of the relatives heard that he was alive in 1872 or 1873." It is not *a statement that all that would be evidence until it [514] was displaced by showing that it was founded upon a mistaken fact—if it had been so said, I should have agreed at once that it was quite right; but it seems to me to be a positive statement that there was evidence that Nutt was alive, even if the jury thought the information which the relatives received was founded upon mistake.

Then the Lord Chief Baron goes on to say: "I, for myself, looking to the whole of the case, not only can see no evidence upon which you would be justified in finding that he was dead, but the very ground of the presumption which sometimes arises of death from a man having disappeared, and then never having been heard of for seven years, is entirely removed by the most positive and direct evidence that every relative he had at Cheltenham, or, so far as we know, in the world, has heard that he was alive." It would have been right if he had said: But if that statement which they heard is proved to your satisfaction to be untrue, or to be founded on a mistake, it goes for nothing, because it does not rebut the presumption. But he does not say that, if he had, it would have been right. He goes on farther: "Then when you come to ask yourselves the question whether what they heard was what ought to have satisfied them at the least that he might be alive." I have already said that verbal criticism ought not to be applied in a case like this; but, looking at the particular circumstances before them, and the particular contention of the plaintiff's counsel, as set out in the bill of exceptions, I cannot help thinking that that would be understood by the jury to mean: "If Robert Nutt has been heard of, no matter how, or where, and even you are satisfied that the hearing was founded upon a mistake, that mere fact of hearing is enough." That I think would be a misdirection. Then he says: "You have before you a person on whom no one pretends to cast a reflection,

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whatever may have been the language in which she made the communication she made to the relatives, she now states positively on her oath that she has no doubt on the subject, that she saw him and knew him, and that it was her uncle Robert Nutt." Had he gone on to put the case of their thinking that she was mistaken in so doing it would have 515] been all right. I think, he ought, under the *circumstances, to have said that, and that his not saying it was an absence of direction where his duty called upon him to give a direction upon the subject. Certainly he does not say that.

Then he goes on to say (I am glad to say, I have only four more lines to read): "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove directly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendants." That seems to me to say as strongly as any judge could say it, there is no evidence upon which you can properly find for the plaintiff, therefore find for the defendants. The learned Chief Baron says: There is no evidence; had he said,—Unless you think that the young woman's recognition was mistaken, there is no evidence which would raise the presumption; but if it is proved affirmatively to your minds that she was mistaken, there is evidence which would raise the presumption; had he said that it would have been all right.

My Lords, I agree that we ought not to criticise any one particular word in this direction to the jury, but taking the whole summing-up as applied to such facts, to such evidence, and to such a contention as are stated upon the record, as being the facts and the evidence, and the contention which then took place, are we satisfied that the learned Chief Baron failed to give the proper direction to the jury. I come, my Lords, very reluctantly to the conclusion that he did fail to give the proper direction, and consequently that there should be a *venire de novo*. I regret it, because, as I have said before, as far as one can form an opinion upon the matter without having the whole of the facts fully before one, I think if the proper direction had been given, the verdict would have been the same—I cannot help that. If the proper direction was not given, the plaintiff has a right to say that the jurors should form their opinion upon the evidence with the proper direction, and consequently there should be a *venire de novo*. The real point which has arisen depends entirely upon the construction of this very inarti-

ficial bill of exceptions; but upon that construction, as I read it, I think the judgment of the Court of Appeal was right.

*LORD GORDON: My Lords, it is with extreme diffi- [516
dence that I venture to join in the views which have been expressed by my noble and learned friend, Lord O'Hagan, because your Lordships have here to construe a judicial act, if I may so express it, which has been more general in use in England than in Scotland. We have the system of exceptions in Scotland, but I must own that I think it has thrown a great deal of discredit upon the system of jury trials which exists in Scotland, and I feel some relief in thinking that this may be considered as about the last case which will arise under a bill of exceptions in this country.

In the present case we have the charge of a learned judge, an experienced common lawyer, addressing a special jury of the county of Surrey, men of great intelligence, and when we come to consider the charge which has been given, we find that not only does the opinion of the Lord Chief Baron Kelly appear to be supported by his own great authority, but we find that Lord Coleridge also I think adopts it, and says substantially that Lord Chief Baron Kelly had left the question as to the accuracy of this witness, Mrs. Chrieman, to the jury, for much of the case turned upon that. The Master of the Rolls takes a different view, but he at the same time says that it is a question attended with very great difficulty, and that you must not scan the words of the judge too narrowly. He says, "I do not mean to say, and I should be very sorry to say, that it is fair to any judge to criticise very minutely every word and every line he made use of. It is for that reason I do not confine myself to any sentence, or any line, or any word, but having read the whole attentively several times in the course of the argument, and having the evidence, the conclusion I have arrived at, after some hesitation is, that he did not leave that question fairly to the jury, that he ought to have left that question to the jury, and, therefore, there ought in this case to be a new trial." Now I venture very respectfully to differ from that view, and to concur in the opinion of Lord Coleridge that really the question was fairly left to the jury.

My Lords, it would be unpardonable in me to go over all the statements of the Lord Chief Baron and the other learned judges who commented upon his summing-up, because these have been *adverted to by the noble and learned [517
Lords who have preceded me, and who are much more

capable than I am of criticising the statements which have been made by the Lord Chief Baron, but I venture to think that if you look at one or two sentences you will find that he says in words—certainly in substance—that it depends upon the accuracy (as to her honesty there was really no doubt) of this niece of Robert Nutt, who said that she had seen her uncle in Australia. He says: “The truth is, it is idle to dream of such a thing; not only is it so, not only have you the direct evidence of this lady, who may be mistaken, for anybody may be mistaken, as sometimes people are so much alike that even their most intimate friends and members of the family may go to speak to one person taking him for another.” He therefore brings out the possibility of mistake in her evidence, and brings it fairly before the jury, and the jurors had said that they did not regard her evidence as conclusive. That shows really that they were an intelligent jury, quite understanding what were the propositions which they had to try, and giving their attention to the evidence upon the point. They had the advantage of hearing the evidence, and also the direction which was sought by the counsel for the plaintiff who asked for a special direction. The jurors therefore saw from an intelligent point of view, for it all passed in the presence of the jury, what really was the true issue which they had to try. As regards the proposition itself, in point of law, which was thus asked to be laid down, that also might admit of criticism, because a proposition when sought to be positively laid down by the judge must be very precise and independent of the circumstances of the case, it must be a pure proposition, and I find here that the proposition is thus expressed generally in very accurate terms, but still containing two words which I think might taint the proposition as a whole, “if the jurymen were satisfied from the improbabilities of the case *or otherwise* that Mrs. Chrieman, junior, was mistaken in believing the said person seen by her in Melbourne to be Robert Nutt, then the said Robert Nutt might be presumed to be dead, having been absent for more than seven years without being heard of.” The words which I object to are “if the jury were satisfied from the improbabilities of the case *or otherwise*.” That is too vague. Our judgment does not proceed at all upon 518] this, but the word “otherwise” *introduced into the proposition on a point of law might, I respectfully think, have justified the Lord Chief Baron in refusing upon that ground to lay down the proposition so expressed.

My noble and learned friends who have preceded me have

stated what is the position in which this case will be left. I cannot say that it is one which involves very large interests; it is a mere question of the payment of the money upon an insurance for £500, and the costs may be more important than the original sum; but if the judgment of the House is given upon the principle *Semper presumitur pro negante*, the result will be that the judgment of the court below will stand. Therefore, while I say I differ from my noble and learned friends with very great diffidence, still I feel bound to express my opinion, and I think it is just one of those cases which give rise to a difference of opinion. We find, however, that a difference of opinion did not exist in the court before which the case came, that is to say, it did not exist between the Lord Chief Baron and the jury-men, for they had no difficulty upon the matter; the difficulty arose in the intermediate Court of Appeal, among the Lords Justices, and, unfortunately, it continues in the present court.

The question was put that the judgment of the court below be reversed.

Their Lordships being equally divided, the appeal was ordered to be dismissed, but without costs.

Lord's Journals, 15th June, 1877.

Solicitors for the appellants: *Barnard & Co.*

Solicitors for the respondent: *Edward Doyle & Sons.*

See 1 Eng. Rep., 467 note; 13 Eng. Rep., 676 note; 15 Eng. R., 648 note; *O'Gara v. Eisenlord*, 38 N. Y., 296, 299-304.

In civil cases death, like any other fact, may be proved by circumstantial evidence, and it is not necessary to produce an eye witness to the act.

Evidence tending to show that one who had disappeared had been for a considerable time laboring under a severe and dangerous disease of the brain and spine, which in the opinion of his physician must have proved fatal in a short time, and must probably have rendered him insane, with evidence of its effect on his feelings and conduct, indicating that his mind was affected by the disease, is sufficient to warrant the submission of the question of his sanity, in a case where it was material, to the jury as one of fact.

A sudden disappearance and the fail-

ure after search to discover any traces of a man who if living could not easily have gone unnoticed, and who was in such a physical and mental condition as to excite the anxiety of his friends, cannot be said to afford no evidence tending to prove his death, or to authorize an instruction to the jury to that effect: *John Hancock, etc. v. Moore*, 34 Mich., 41.

In an action of ejectment by parties claiming through the heirs of one who is asserted to be deceased, oral evidence indirectly proving death is admissible, consisting of those circumstances from which the death of the person may be reasonably inferred, such as long absence without any intelligence from him, reputation in the family, and their conduct thereupon, and other circumstances.

The presumption of life, with respect to persons of whom no account can be

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given, ends at the expiration of seven years from the time they were last known to be living; and when it is sought to prove death within that period by circumstantial evidence, there must be a showing of diligent inquiry at the last place of residence, and among relatives, and any others who probably would have heard of the person if living, and also at any known place of fixed foreign residence: *Bailey v. Bailey*, 36 Mich., 181-2.

An annuitant 66 years of age, who had been accustomed to call on the executor regularly and frequently for his money, on which he was dependent for support, left his abode in May, without indicating an intent of remaining absent, and was never afterwards heard from.

During the same month he had called and received about half a year's income. His physician testified that at the time when he disappeared he was suffering from incurable disease, under which he could not have survived more than three months. Held, that these facts were sufficient to sustain a finding that his death during the fall of the same year might be presumed: *Matter of Ackerman*, 2 Redfield's Surrogate's Rep., 521.

The father and two children sailed in the *Schiller* and were lost in its wreck, there being no evidence of any survivorship. In an action brought for a construction of the will of the wife of the father and mother of the daughters and the determination of the persons entitled to a trust estate under the will: Held, that there was no presumption of law arising from age or sex as to the survivorship among persons whose death is occasioned by one and the same cause, nor is there any presumption that they all died at the same time, but the burthen of proof is upon the one asserting the affirmative. That, under the will, the title to the estate vested in the trustees immediately on the death of the testatrix and so remained until the death of the children and husband, and that no title or legal interest therein vested in the husband or children.

That as the legal title was not in the children, they had nothing, if they perished in the same moment, to transmit, and that in order to authorize the next

of kin or heirs-at-law of either child to take, the survivorship of such child must be proved: *Newell v. Nichols*, 12 Hun, 604; *Robinson v. Gallier*, 2 Wood's C. C. Rep., 178.

Where the testatrix and her two grandchildren were lost in a shipwreck, and it appearing that a wave bore the testatrix from the saloon in which the children were with her, and she was not seen afterwards alive, the grandchildren being seen a few minutes afterwards, when the saloon, with its inmates, was carried away: Held, that while from such facts it cannot be said to be absolutely certain that the testatrix died first, yet under the case of *Pell v. Ball* (1 Cheves' S. C. Eq., 99) the evidence might justify such a conclusion. The burthen of proving a survivorship rests upon the party who claims through it: *Stinde v. Ridgway*, 55 How. Pr. Rep., 301.

The case of *Hartshorn v. Wilkins* (cited 13 Eng. R., 679 note) is reported in 2 "Oldright," Nova Scotia, 276, instead of 2 "Pugsley." "Pugsley" is a New Brunswick and not a Nova Scotia Report.

The case referred to in 2 Southern Law Rev., 594, is reported as *Robinson v. Gallier*, 2 Wood's C. C. Rep., 178.

The by-laws of a masonic insurance company provided, that the death of a member was to be made known to the company by the affidavit of two respectable witnesses, the genuineness of which should be vouched for by the secretary of the lodge nearest the place of the decease, in which affidavit should be stated when, how, and where deceased came to his death, etc.; that this proof should be laid by the president before the board of directors at their next monthly meeting, and upon their decision each member of deceased's class should be assessed \$1. M. disappeared in November, 1869. In June, 1871, the board of directors passed a resolution declaring themselves satisfied of his death and ordering an assessment. There was no evidence to show that the regular proof of death was ever presented:

Held, that the assessment should be made on those who were members of the company at the date of the aforesaid resolution, and not on such as were members at the time of the disap-

pearance: *Miller v. Georgia Masonic, etc.*, 57 Geo., 221.

In an action to recover on a policy of insurance, letters of administration upon the estate of the deceased are not admissible to prove his death: 13 Eng. Rep., 678 note; *John Hancock, etc., v. Moore*, 34 Mich., 41.

Contra, *Lancaster v. Washington, etc.*, 62 Missouri, 121; and see note to *Carroll v. Carroll*, 19 Am. Rep., 148, and *Milligan v. Bowman*, 46 Iowa, 55.

Though a party can never be compelled, against his will, to accept his adversary's admission in lieu of record evidence.

A paper which is admissible in evidence for one purpose does not become inadmissible because it cannot be used for another. •

In an action by an administrator upon a life insurance policy, the letters of administration are admissible in evidence to show the plaintiff's capacity, and they cannot be excluded on the objection that they are no evidence of death. So an admission that proofs of death had been furnished to the company will not preclude the introduction of the documentary evidence: *John Hancock, etc., v. Moore*, 34 Mich., 41.

[2 Appeal Cases, 519.]

H.L. (Sc.), March 6, 1877.

[HOUSE OF LORDS.]

***LOCKYER Appellant; FERRYMAN *et al.*, Re- [519
spondents⁽¹⁾.**

Marriage—Suit for Declarator dismissed—Suit renewed—Res judicata.

In 1842 a suit for declarator of marriage was brought against a lady, but after trial was dismissed in 1846. In 1875, after the lady's death, a second suit was brought for declarator of the same marriage, and for reduction of the former decree. In 1876 the second suit was held to have been barred by the plea of *res judicata*, and this decision, on appeal, was affirmed by the House of Lords.

Per THE LORD CHANCELLOR⁽²⁾: The appellant has not alleged any new matter whatever coming to his knowledge which should entitle him to get rid of the former proceedings.

Per LORD HATHERLEY: I do not apprehend that we need go further than to say that this gentleman—who had the opportunity of having his case fairly heard thirty years ago—cannot now, after the death of the person principally concerned, be in a position to ask that the principle of *res judicata* shall not be pressed to its fullest and furthest results.

Per LORD SELBORNE: When there is *res judicata* the original cause of action is gone; and it would be destructive of all certainty in the administration of law, in the status of families, and in the enjoyment of rights, if it were not held incumbent on any one attempting to get rid of a solemn judgment to show that he comes forward to do so with reasonable promptitude and diligence.

Per LORD BLACKBURN: The object of the rule of *res judicata* is always put upon two grounds; the one, public policy, that there should be an end of litigation; the other, the hardship on the individual that he should be vexed twice for the same cause. It seems to me that nothing is here alleged that would have been ground for a new trial before, and *a multo fortiori* there is nothing alleged that would be ground for a new trial after, judgment pronounced thirty years ago.

Per LORD GORDON: It would be lamentable for the law of Scotland, especially with reference to the marriage law, if it were competent for parties to come forward again after a lapse of thirty years and ask for a new trial with reference to matters which must have been within their own knowledge when the cause was originally tried.

⁽¹⁾ Affirming 8 Dunlop, 582, Scotch Cases, 4th series, vol. 3, p. 882. ⁽²⁾ Lord Cairns.

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ON the 5th of April, 1842, Mr. Lockyer brought an action asking from the Court of Session a declarator to the effect that he and Miss Janet Sinclair of Freswick, in Caithness, 520] had intermarried, *and stood towards each other in the relation of husband and wife by contract *per verba de præsenti*, and also by promise *subsequente copulâ*. The summons averred the contract, but was somewhat obscure as to the promise *cum copulâ*, which, however, was subsequently and positively asserted in the condescendence.

Miss Sinclair met Mr. Lockyer's allegations by an absolute denial of the marriage; and although it appeared that a considerable intimacy had subsisted between the parties, and that written, or verbal, declarations had been interchanged by them, evidencing an ultimate nuptial *intention*, there was no proof of any present agreement to constitute an actual and valid marriage; Miss Sinclair declaring to Mr. Lockyer her aversion to private irregular marriages, and her resolution to marry only by public and formal celebration. Of the alleged promise *cum copulâ* no proof was tendered. The Court of Session on the 3d. of March, 1846, pronounced judgment in favor of Miss Sinclair, assoilzieing her from the whole conclusions of the summons with expenses (').

Against this decision Mr. Lockyer, on the 15th of February, 1849, presented an appeal to the House of Lords, and Miss Sinclair put in her answer thereto on the 26th of March, 1849. But neither party moving further in the case, the appeal, on the 11th of February, 1850, under a standing order of the House, stood dismissed, for want of prosecution.

Twenty years afterwards, in June, 1870, Miss Sinclair departed this life, having appointed Mr. Ferryman and the other respondents to be her trustees.

On the 9th of August, 1875, the present action was commenced by Mr. Lockyer against Miss Sinclair's trustees, renewing his application for a declarator of his marriage with her, praying a reduction of the prior interlocutors against him, and also of her trust deeds, with a decerniture to make over to him the whole of her means and estate.

The trustees appeared as defenders, insisting that the second action was barred *exceptione rei judicatæ*, and also by delay and acquiescence.

The Lord Ordinary (Lord Craighill), on the 15th of February, 1875, assoilzied the defenders from the whole conclu- 521] sion of the *summons with expenses; and upon a

(') 8 Dunlop, 582.

reclaiming note the Second Division of the Court of Session, on the 28th of June, 1876, adhered to the Lord Ordinary's interlocutor with additional expenses⁽¹⁾ whereupon Mr. Lockyer appealed to the House of Lords, having for his counsel Mr. Campbell Smith of the Scotch bar and Mr. MacAlpine; who contended that the appellant was entitled to a declarator of marriage on the ground of matrimonial consent, but chiefly on the ground of promise followed by consummation; urging that the decrees in the former action had been obtained through fraud and by false evidence; adding that new evidence had at last become available, and would establish the appellant's case on *media concludendi* different from the grounds relied upon in the former litigation. And they further insisted that no lapse of time could establish *res judicata* when obtained by fraud and false evidence. They cited the following authorities: *Shedden v. Patrick* ⁽²⁾; *McPherson v. Tytler* ⁽³⁾; *Duchess of Kingston's Case* ⁽⁴⁾; *Gow v. Stackpool* ⁽⁵⁾; and *Bandon v. Bocher* ⁽⁶⁾ ⁽⁷⁾.

The Lord Advocate and Mr. Southgate, Q.C., the respondents' counsel, were not called upon to address the House; their Lordships delivering the following opinions:—

THE LORD CHANCELLOR ⁽⁸⁾: My Lords, upwards of thirty years ago proceedings were commenced to pronounce in an action of declarator that a certain marriage had taken place between the present appellant and a lady now dead. Those proceedings went through various stages, and resulted in a decree ⁽⁹⁾ against the appellant, in substance *deter- [522 mining that the marriage upon which he founded his case had not taken place.

The appellant did not assert a regular, but an irregular marriage. In the summons certain written documents were alleged to have passed between the appellant and the lady in question, and to have established a contract of marriage; and then the summons averred,

That the said acknowledgements were interchanged with the solemn and serious intention of constituting marriage, and marriage was thereby fully constituted between the parties; that the parties, when they thus made their mutual

⁽¹⁾ 4th Series, vol. iii, p. 882.

⁽²⁾ 1 Macq. (House of Lords Cases), 535.

⁽³⁾ 1 Dunlop, 718.

⁽⁴⁾ 20 How. St. Tr.

⁽⁵⁾ 1 Dow., 18.

⁽⁶⁾ 3 Cl. & F., 510.

⁽⁷⁾ In the court below the appellant cited the doctrine of the Canon Law which affirmed that *sententia lata contra matrimonium nunquam transit in rem*

judicatam. The judges, however, held that in Scotland no such doctrine has been admitted since the Reformation; and at the bar of the House the canonical precept, which would have barred the plea of *res judicata*, was not pressed on the attention of their Lordships.

⁽⁸⁾ Lord Cairns.

⁽⁹⁾ Dated 3d March, 1846.

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declarations of the said marriage, kissed the Bible in testimony of their understanding of the seriousness of the declaration and their mutual resolution to adhere to it; that the marriage was thus duly completed, and the parties afterwards considered themselves as married and conducted themselves towards each other as husband and wife; they did not wish to make the contract public till the consent and approbation of certain parties was obtained; that the parties were much together, and when absent kept up a constant and affectionate correspondence, the whole of which was written in a style and manner that could not have been written by a lady to a gentleman in any other character than that of an affectionate wife to an affectionate husband, or an affectionate husband to an affectionate wife; that the affectionate intercourse subsisted between the said parties till a comparatively recent period; that notwithstanding what is above set forth, the defender⁽¹⁾, owing to the arts and importunities of her friends, has recently become estranged from the pursuer, and casting off the fear of God, and forgetting her solemn vows and matrimonial engagements, does now most wrongfully and unjustly refuse to adhere to the pursuer as her husband.

Now, your Lordships are well aware that irregular marriages in Scotland may be established either as marriages *per verba de præsenti*, or as marriages by promise *subsequente copulâ*. The allegations which I have quoted went clearly and distinctly to a marriage *per verba de præsenti*; but the summons also averred a promise of marriage between the parties; and it contained further averments, which in some respects were ambiguous and might be considered as merely confined to a contract *per verba de præsenti* or as going beyond it.

The summons was met in the first instance by a defence on the part of the lady, in which, adverting to those allegations in the summons which I have read, she said:

It is denied that the marriage was thus duly completed, and that the parties afterwards considered themselves as married, and conducted themselves towards 523] *each other as husband and wife. What the specific acts may be to which the pursuer means to refer as supporting these averments, the defender is at present at a loss to conceive, and she can therefore only meet them with a denial as general as the assertions themselves, which are altogether unfounded.

That is to say, the lady replied to this summons by saying, "You allege that we conducted ourselves towards each other as husband and wife; that is a general allegation which may comprehend in it every kind of conduct which can take place between husband and wife. I desire to know what are the particulars to which you refer; at present I can only deny generally what you allege generally; and in that form I do deny what you allege." Being thus challenged, a revised condescendence was submitted on the part of the appellant, in which he addressed himself to this particular matter; and having again alleged the promise of marriage, he averred further in the most positive and distinct way that the marriage was duly consummated by sexual

(1) Miss Sinclair.

intercourse; and he stated particularly the dates and times when this intercourse, as he alleged, took place. To that revised condescendence there was a pleading on the part of the lady, both by way of answer to the different allegations in the revised condescendence, and by way of statement of facts on her own part, in which she, in the most positive and distinct manner, denied every one of the allegations with regard to sexual intercourse. ♦

My Lords, in that state of things, there having been a summons, which, although ambiguous, was in my opinion large enough to have covered and included in it the allegation of cohabitation and consummation of marriage, and the appellant being challenged to condescend more precisely upon the particulars of his general allegation, the consummation of the marriage having been denied, I think it cannot admit of doubt that if the appellant had been able to do it, he would have entered upon proof to establish the cohabitation which he thus alleged. My Lords, he did not do so; he adduced no proof whatever upon the subject. Evidence was led, perhaps unnecessarily, on the part of the defender, but upon the part of the appellant no evidence whatever was produced: and, feeling the weakness of this part of his case, he by his counsel at the bar did not insist upon it.

The Court of Session upon the other part of the case, that is to *say, upon the allegation of a marriage *per* [524 *verba de præsenti*, held that that which passed between the parties had not passed with any serious intention of creating the relation of husband and wife. With the correctness of that decision your Lordships are not at present concerned; but that was the decision both of the Lord Ordinary and of the Court of Session. An appeal was presented against it to this House, but was dismissed; it not having been brought on for argument in the proper time.

That being the state of matters upwards of thirty years ago, the present action was raised in 1875 for the purpose of reducing the decrees in the former action. The appellant now contends in the first place that although there was in the former action an allegation of marriage, still no proof having been adduced upon the allegation of consummation, and it not being, as was alleged at the bar, distinctly averred in the summons that a marriage was completed by consummation following upon a promise—the plea of *res judicata* is not a valid plea to be set up to prevent the attempt now to assert a marriage by promise *subsequente copulâ*. And then it is said further that matters have now come to the knowledge of the appellant which ought to entitle him

to reduce the former proceedings, and to get rid of the effect of the plea of *res judicata*.

My Lords, it appears to me that in the former proceedings, the summons being such as I have mentioned, and the condescendence following upon that summons being of the kind it was; if the present appellant had had it in his power to adduce evidence of the consummation of the marriage following upon a promise he would have been well entitled to do so; and if having adduced that evidence the court had been of opinion that he had proved his case, and had thereupon made a declarator establishing the marriage, that would have been an establishment of the marriage which would have been binding upon both parties, and which could not afterwards have been disturbed by reason of any insufficiency in the pleading. It might well be that if in the course of the proceedings any want of preciseness in the averments had been noticed, steps might have been taken to cure or supplement them; but I cannot think that there was any such insufficiency in the summons, followed as it 525] was by the condescendence in the shape *in which we find it, as should entitle the appellant afterwards to say that he had not the power of raising the whole of the case in regard to this marriage, if he had had evidence to prove it.

My Lords, I doubt very much whether it is at all necessary in the present case to lay down any abstract rule as to the extent to which a sentence in a declarator of marriage is binding as against any subsequent attempt that may be made to establish the marriage upon any new or different footing. I think it is quite sufficient in the present case to say that no man who shows that at the time of his first proceedings he had the whole facts within his knowledge, and who had the power to raise them—who puts upon his record statements which prove that he had the whole of this knowledge in his possession—can be heard, because he does not attempt to prove one part of the case, to say after the lapse of thirty years that he is entitled to commence a new litigation, to raise again a portion of the case which, if it had any foundation, was perfectly well known to him at the time of his first proceedings.

But now I turn to a consideration of what are the new facts which the appellant says have come to his knowledge since the former action, and upon which he now claims to reopen this litigation. The averments, the relevancy of which is now in question, are extremely vague throughout the whole course of them; but as I understand them they amount simply to statements in which referring to witness

after witness who was examined on the former occasion, not by the appellant himself (for he led no evidence), but on the part of the lady, he asserts now as to all those witnesses that what they stated was contrary to the truth; and then further with regard to the greater portion of them that they committed perjury either with the connivance or at the instance of the lady; that is to say that she was guilty of subornation of perjury; and upon those conjoint allegations of perjury on the part of the witnesses and of subornation on the part of the lady he seeks to have the case retried.

Now, my Lords, I must say that I think the observations of Lord Gifford in the Court of Session are perfectly well founded⁽¹⁾, that in every case where witnesses are called before a tribunal which is to judge of the facts spoken to by those witnesses, it is *for that tribunal to say whether [526 it believes or disbelieves them; if it believes them it is not for the defeated party afterwards to say, I assert that those witnesses spoke what was not true, and upon my allegation that they spoke what was not true I ask, as a matter of right, that there should be a new trial before another tribunal so that I may take my chance of what that other tribunal may determine on the facts which may be deposed to. My Lords, there would be no end to litigation if that were held to be a sufficient and a relevant ground on which to ask for the reduction of a former decree.

But, my Lords, those witnesses gave their evidence thirty years ago, and spoke to facts as to the truth or falsehood of which the present appellant was a perfectly competent judge; for they were facts which in one way or other were perfectly within his knowledge. He had the full means of judging as to whether the allegations of the witnesses were true or untrue—he admits that he had that full opportunity of judging. He does not say he thought their statements were true then, and he has discovered them to be untrue now; but his case is that he knew at the time that the witnesses were saying what was untrue, and that that has been his opinion from that day to the present time. But what has he been doing these thirty years if those witnesses spoke what was untrue? Has he taken any means for bringing the criminal law of the country to bear upon them, and to have it decided whether those witnesses were or were not chargeable with that perjury of which he says they were guilty? He has taken no step whatever. Let it be granted that he could not in Scotland, as perhaps he could

⁽¹⁾ 4th Series, vol. iii, p. 905.

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in this country, have moved to bring the criminal law to bear upon them, has he applied to the proper officer, the public prosecutor in Scotland, to have these persons subjected to the penalties of the criminal law? He has done nothing of the kind, he has rested for thirty years, and he now makes allegations as to the perjury of these witnesses which he was just as competent to have made immediately the former trial terminated. He throws in the additional allegation of subornation of perjury on the part of Miss Sinclair—he says that that lady was either privy to this perjury, or was herself one of the persons moving to have it committed, but he says that after the lapse of thirty years, when this lady is in her grave; and I think your Lordships 527] will not consider that the vague and hardly *intelligible allegation which is contained in the condescendence, to the effect that the lady moved towards having perjury committed, can be sufficient to place the case higher than if it stood simply upon the allegation of perjury committed by the witnesses.

My Lords, I therefore submit to your Lordships that the present proceedings instituted by the appellant are met, and rightly met, by the plea of *res judicata*. He has not alleged any new matter whatever coming to his knowledge which should entitle him to get rid of those former proceedings. And there are no facts here alleged as having come to his knowledge which could be held relevant in a proceeding to reduce the former adjudication.

My Lords, I therefore, agreeing entirely with the Lord Ordinary and the judges of the Second Division of the Court of Session, think that the case of the appellant has entirely failed, and I move your Lordships that the present appeal be dismissed with costs.

LORD HATHERLEY: Notwithstanding the able argument which we have heard, I think it is impossible for your Lordships to have the least doubt that the court below have come to a correct conclusion. You have now an application made after thirty years' interval, to have the decision of the Court of Session reduced, on the ground that it was obtained in the first place by perjury committed by the witnesses, and in the second place by subornation of perjury on the part of this lady who has now been for some time in her grave.

My Lords, the safety of mankind, and all that is dear to mankind, may be put in jeopardy if after such a long interval it be permitted for any pursuer to come, without alleging any reasonable ground whatever, and ask to deal with a *res judicata* upon a fair hearing to which he was a party,

and at which hearing he might, had he been so minded, have done all that he now says he is able to achieve.

I do not apprehend that we need go further than to say that this gentleman, who had the opportunity of having the case fairly heard, cannot now, after the death of the person principally concerned, be in a position to ask at your Lordships' hands that the principle of *res judicata* should not be pressed to its fullest and furthest results. Therefore, my Lords, I am of opinion that the appeal should be dismissed with costs.

*LORD SELBORNE: My Lords, I agree with my [528 noble and learned friends who have addressed your Lordships; and I have but a few words to add upon the second branch of the case.

This is not an action to which the law of prescription applies. When there is *res judicata*, the original cause of action is gone, and can only be restored by getting rid of the *res judicata*. There is no law in Scotland (nor, I should hope, of any other country) which gives forty years or any other specified period for this purpose; and it would be most unreasonable and destructive of all certainty in the administration of the law, in the status of families, and in the enjoyment of rights of any description, if it were not held incumbent on any one attempting to get rid of a solemn judgment of a competent court on such grounds as are here alleged, to show that he comes forward to do so with reasonable promptitude and diligence, instead of deliberately allowing such a time to elapse as must make it unjust to reopen the question, because any satisfactory investigation of it would be now impossible. In every such case the nature of the allegations, the presence or absence of such a specification of particulars as may enable a court to judge of their value, the time at which, and the circumstances under which they are brought forward, are, and necessarily must be, material upon the question of relevancy. Here, as to the greater part of the allegations, no excuse whatever is offered for the delay in bringing them forward—others are discredited by the appellant's own statement, that the persons on whose assertions he relies were not willing to speak what they now allege to be truth while those were living who could contradict them; and the rest are too vague and indefinite to be accepted as constituting grounds *prima facie* sufficient, at this distance of time, to set aside the judgment of 1846.

LORD BLACKBURN: My Lords, I entirely agree in the opinions expressed by the noble and learned Lords who have

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preceded me. When a competent tribunal, having had a case before them, have given a final judgment, it is *res judicata*. I do not mean to express any opinion as to what would be a sufficient ground to reopen the case. It is enough for the purposes of the present case, and I may safely say thus 529] *much, that it must at least be as strong as that on which a new trial would be granted. After the verdict of a jury or the finding of a judge there may be an application for a new trial on the ground that the verdict was against the weight of evidence, or that the parties were taken by surprise, or that there was false evidence given; but I apprehend that it never is enough simply that the party against whom judgment has been given should say he is dissatisfied with the verdict, and that the witnesses have stated that which is false. I do not think that would be held to be sufficient even in moving for a new trial at the proper time to do it. It is necessary that enough should be shown to make the tribunal which is to consider whether there should be a new trial think that the trial was unsatisfactory. In the present case I think that if every averment now upon the record had been made by the pursuer on an application for a new trial at the time of the reclaiming note in 1845, the proper judgment of the court on the application then brought before them would be: "This is not a case in which we need call upon the other side for an answer."

It is most pointedly and indignantly denied that there was any sexual intercourse at all. I find the lady persisting in her denial—that is all the surprise he gets. He did not bring forward any evidence, and he could not have asked for a new trial. Every other averment is of the vaguest and loosest description. He says the witnesses were kept back by terror. Those are not matters which, if they had happened, would be for a moment listened to.

That being so, if nothing is put forward which would be a ground for a new trial, or even for granting what in England is called a rule *nisi* to show cause why there should not be a new trial—I suppose in Scotland there is something similar to it—nothing that would require the court to call on the other side for an answer, can it be said that now, after a lapse of thirty years, a party in the position of this appellant is entitled to demand further proof?

I think Mr. Smith put it very well at your Lordships' bar in this way, "I do not say that what I put forward proves that I am entitled to set aside the judgment; but what I say is 530] enough to *give me the right to go to proof and to go to trial." That was the argument used, but I cannot

agree that after *res judicata*, after judgment has been obtained, it is enough to aver that the thing was wrong. The object of the rule of *res judicata* is always put upon two grounds—the one public policy, that it is the interest of the state that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause. It seems to me that nothing is here alleged that would have been ground for a new trial before judgment was pronounced; and *à multo fortiori* there is nothing alleged that would be ground for a new trial after judgment pronounced thirty years ago.

LORD GORDON: My Lords, I agree that the principle of *res judicata* applies to the present proceedings; and I also think that the noble and learned Lord who last addressed the House has shown the impropriety of acceding to any such application as is made for a new trial in this case, which was decided thirty years ago.

It would be lamentable for the law of Scotland, and especially with reference to the marriage law, if it were competent for parties to come forward again after a lapse of thirty years and ask for a new trial with reference to matters which must have been within their own knowledge when the case was originally tried.

I can only say that I am sure your Lordships have derived all the assistance which counsel could possibly give you from the appellant's counsel, Mr. Smith, who has brought the case fairly and fully before your Lordships; and I think every justice has been done, and that the full consideration which this case has received from your Lordships as well as from the court below ought to satisfy him that he has no case.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Agent for the appellants: *R. M. Gloag.*

Agent for the respondents: *Andrew Beveridge.*

[2 Appeal Cases, 531.]

H.L. (Sc.), March 22, 1877.

[HOUSE OF LORDS.]

*McKINNON, Appellant; ARMSTRONG BROTHERS & [531]
Co., Respondents (¹).

Per LORD BLACKBURN: The law of Scotland on the subject of compensation and retention in bankruptcy is, in effect, very nearly, if not precisely, the same as the law of England with respect to mutual credit.

(¹) Affirming Scotch Cases, 4th Series, vol. i, p. 399.

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Per LORD BLACKBURN: I think the law is tersely and accurately expressed by Lord Ormidale in the court below. He says: "I can neither find authority, nor see any good reason for holding, that the circumstance of a party having a collateral security for his debt is destructive of his right of compensation or set-off—supposing it to be otherwise well founded."

Per LORD BLACKBURN: It has for many years been decided, both in England and in Scotland, that if the indorser of a bill became a party to the bill before the bankruptcy, he may set it off on becoming holder afterwards.

THE appellant, as trustee on the sequestrated bankrupt estate of Hannay & Sons, iron masters in Glasgow, brought the present action against the respondents, iron brokers in Glasgow, for payment of £9,000, the purchase-money of iron sold and delivered by the bankrupts to the respondents in 1874.

The defence was that the amount sued for was more than satisfied by a counter claim of £13,000 due from the bankrupts under seven bills, of which the respondents were the onerous indorsees and holders.

On the other hand, the appellant asserted that the respondents were not the holders of the bills at the date of the sequestration; and that they moreover had a security from a third party to relieve them from the debt.

The Court of Session (Second Division) decided in favor of the respondents with expenses (¹), and hence the appeal to the House.

532] *Mr. *Joseph Brown*, Q.C., and Mr. *Balfour* (of the Scotch bar), were heard for the appellant.

Mr. *Cotton*, Q.C., and Mr. *E. Kay*, Q.C., for the respondents, were not called upon; the House adjourning, with a request that Lord Blackburn would specially examine the intricate details presented by the pleadings. His Lordship ultimately delivered the following address (²), stating fully all the material facts, and commenting on the authorities cited and bearing on the question.

LORD BLACKBURN: My Lords, in this case the appellant, as trustee for the sequestrated estate of Hannay & Sons, sued the respondents in the Court of Session for a debt due by them before the sequestration to Hannay & Sons. It is not disputed that the appellant proved a debt exceeding £11,000, and it is not disputed that the respondents proved a cross claim exceeding £2,000. The controversy is as to the difference, which exceeded £9,000.

As to this the respondents set up two defences. One was as to a part of the claim only, viz., £7,461 10s. 1d. It is not necessary to notice this partial defence, further than to

(¹) 4th Series of Scotch Cases, vol. i, p. 399,

(²) Printed and afterwards revised by his Lordship.

say that there was such a defence, and that the appellant denied it.

The other defence, on which the questions discussed at the bar and on which the House has now to decide arise, went to the whole cause of action. It was to the following effect: Hannay & Sons had, whilst still carrying on business, accepted seven bills of exchange drawn on them by Armstrong, Müller & Co., payable to the drawer's order. These seven bills were all drawn and accepted for iron sold and delivered to Hannay & Sons in the course of the year 1873, whilst Armstrong, Müller & Co. were still carrying on business. Armstrong, Müller & Co. dissolved partnership on the last day of December, 1873, after which date the firm only existed for the purpose of liquidation. Armstrong, Müller & Co. in liquidation indorsed those bills, and Armstrong Brothers, the respondents, also indorsed them and delivered them to the Clydesdale Bank, who discounted them for Armstrong Brothers. On the *28th of [533 March, 1874, before any of the bills arrived at maturity, Hannay & Sons, the acceptors, were sequestrated, the bills at that date being in the hands of the Clydesdale Bank.

The respondents' contention was, that under the Scotch law of compensation and retention in bankruptcy they were entitled to set off these acceptances, or so much of them as might be necessary, against their own debt to the sequestrated estate of Hannay & Sons. And as the amount of these acceptances considerably exceeded the amount of the respondent's debt, this, if made out, was a complete answer to the claim of the appellant. The appellant contended that the position of the respondents was not such as to entitle them to this set-off.

The Lord Ordinary, before whom the case was tried, was of opinion that, on the evidence, neither defence was made out, and by his interlocutor of the 29th of October, 1874, he gave judgment for the appellant for the amount claimed. The Second Division of the Court of Session, by their interlocutor of the 2d of February, 1875, recall that interlocutor, and assoilzie the defenders from the conclusion of the action. It is against this last interlocutor that the appeal is brought to this House.

It appears from the opinions delivered by the judges of the Court of Session that they were of opinion that the defence depending on compensation and retention was made out; but that the partial defence going only to £7,461 10s. 1d. was not made out.

My Lords, if the defence going to the whole is made out,

the interlocutor appealed against is right, whether the partial defence was made out or not. Your Lordships have not heard any argument as to the soundness of the decision on the partial defence, nor has it been at all considered by your Lordships. I only mention it for the purpose of saying that that decision is in no way affected, either for the better or the worse, by the judgment to which the House may come to on the other defence, which goes to the whole.

∴ Your Lordships heard an exhaustive argument from the appellant's counsel, at the end of it intimating that you did not then think it necessary to hear the counsel for the respondents.

My Lords, the law of Scotland on the subject of compensation *and retention in bankruptcy, and the history of it, is clearly explained in Bell's Commentaries (¹). It is in effect very nearly, if not precisely, the same as the law of England as to mutual credit, though there is no statutable enactment in the acts relating to bankruptcy and sequestration in Scotland similar to those relating to mutual credit, which since the 4 Anne, c. 17, s. 11, have been inserted in the English Bankrupt Acts. If there be any differences between the law of the two countries, there are at least none on such a state of facts as exist in the present case. I think your Lordships refrained from giving judgment at once more from a desire to make sure that the facts as appearing on the evidence were accurately apprehended, than from any doubt as to what the law was as to those facts if rightly understood.

I will now proceed to state what I understand to be the material facts as proved. They are a little complicated from there being five firms engaged in the transactions, viz.: T. Vaughan till the end of 1872, and from that date T. Vaughan & Co., who carried on the business of T. Vaughan. These two firms may, however, be treated as if they were one. Armstrong, Müller & Co., who dissolved partnership on the 31st of December, 1873, when Müller retired, and from that date existed only for the purpose of liquidation. Hannay & Sons, who were sequestered on the 28th of March, 1874. Armstrong Brothers, the respondents, a firm which was formed on the 1st of January, 1874, and succeeded the dissolved firm of Armstrong, Müller & Co. This new firm (the respondents) consists of W. T. Armstrong, who is a partner in the late firm of Armstrong, Müller & Co., and T. N. Armstrong, who was not in any way a member of that firm.

(¹) 7th ed., vol. ii, p. 118, book 5, ch. 4, sect. 2.

It is necessary for the right apprehension of the facts to bear in mind the different interests of the four firms. 1st. T. Vaughan and T. Vaughan & Co., treating them as one. 2d. Armstrong, Müller & Co., both before and since the dissolution. 3d. Hannay & Sons. 4th. Armstrong Brothers.

The first transaction to be noticed is a contract bearing date the 26th of June, 1872, by which Armstrong, Müller & Co. agreed to sell to Messrs. Hannay & Sons 6,000 tons No. 4 Middleborough forge iron at 92s. per ton, delivered into Messrs. Hannay & Sons' works, *delivery to be [535 made at about the rate of 1,000 tons per month, commencing July, 1873, and ending December, 1873. Payment net cash on last cash day of the month for the quantity delivered during the previous month, or by acceptance payable at four months, adding cost of stamp and discount. It was at first supposed by the appellant that this contract was really made on behalf of Thomas Vaughan; but the evidence proves beyond all doubt that this was the contract of Armstrong, Müller & Co. as principals, and not of T. Vaughan at all; and the appellant has not, either before the Court of Session or at your Lordships' bar, disputed this.

The seven bills in question were all drawn and accepted in payment for iron supplied to Hannay & Sons in pursuance of this contract. It is only material to point out that for the iron delivered in December, 1873, payment would not fall due till January, 1874, which was after Armstrong, Müller & Co. had dissolved partnership, and after the respondents' firm of Armstrong Brothers had been formed and had begun to carry on business. Armstrong, Müller & Co., with a view no doubt to secure iron with which they would be able to fulfil their contract to Hannay & Sons, entered into negotiations with Thomas Vaughan, which resulted in a contract, in fact concluded some weeks after the 26th of June, 1872, but dated on that day as being the day on which the negotiation commenced. By this contract Thomas Vaughan bound himself to supply to Armstrong, Müller & Co. the same quantity of iron at the same dates and of the same quality as that which Armstrong, Müller & Co. had bound themselves to supply to Hannay & Sons. But the place of delivery was different, being free on board Tees, and the price was different, as of course it should be, as Armstrong, Müller & Co. would be at the risk and expense of the sea carriage from the Tees to Glasgow, and meant to make some profit. The payment was to be "Net cash on last cash day of the month for quantity delivered

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during previous month, or by Messrs. Hannay & Sons' acceptance at four months' date."

There can be no doubt that Armstrong, Müller & Co. entered into this contract with the intention of applying the iron they were to receive from T. Vaughan to the fulfilment of their contract with Hannay & Sons. But the two contracts were perfectly independent. *Armstrong, Müller & Co. must have fulfilled their contract to Hannay & Sons though T. Vaughan had made default in delivering iron to them, or though the iron shipped in the Tees had been lost at sea; and they were bound to take and pay for the iron supplied by T. Vaughan even if Hannay & Sons' failure had happened a year sooner than it really did, and before any iron was deliverable from Armstrong, Müller & Co. to Hannay & Sons.

When on the last cash day in August, 1873, the first payment fell due from Armstrong, Müller & Co. to T. Vaughan for iron shipped in the month of July, 1873, a question arose between them and T. Vaughan & Co. (who had succeeded T. Vaughan). Armstrong, Müller & Co. (on what ground does not appear), required T. Vaughan & Co. to draw upon Hannay & Sons for the amount. Vaughan & Co. maintained, with apparent reason, that though they were to take payment in Hannay & Sons' acceptances, that meant Hannay & Sons' acceptances of Armstrong, Müller & Co.'s draft. The contract, it may be observed, does not expressly say who were to draw on Hannay & Sons. The dispute went so far, that on the 30th of September Vaughan & Co. made a peremptory demand of payment next day, or else they would place the matter in the hands of their solicitors. On cooler reflection, however, the two firms resolved not to quarrel; and on the 23d of October, 1873, a compromise was made, which was embodied in a letter of that date, It looks as if Vaughan & Co. had said to Armstrong, Müller & Co., We do not wish at present to have our name on Hannay's paper; you ought to draw the bills; and after all, what risk do you run, for Hannay & Sons are sure to meet them, and Armstrong, Müller & Co. had answered, If you think the risk is so small why do not you take it on yourself. If you do we will draw on Hannay as you require. As the event has turned out, it was a mistake to think that there was no risk of Hannay & Sons not fulfilling their engagements. But as Vaughan & Co. on the 28th of August, 1873, agreed to supply to Hannay & Sons no less than 12,000 tons of iron, they must then have thought that risk slight. At all events, the letter of October the 23d is aptly

worded to carry out a compromise on those terms above supposed. From that time all went on peaceably.

The alternative of Armstrong, Müller & Co. discounting the *drafts seems to have been adopted, and Arm- [537 strong, Müller & Co. retained their drafts on Hannay & Sons in their own possession, letting T. Vaughan & Co. have cash from time to time in anticipation. The drafts on Hannay & Sons by Armstrong, Müller & Co. were for the iron delivered at the rate of 92s. per ton. The draft to which Vaughan & Co. were entitled would have been only at the rate of 85s., but the parties acted as if a separate draft had been drawn and discounted by Armstrong, Müller & Co.

On the 31st of December, 1873, the firm of Armstrong, Müller & Co. dissolved partnership on terms which were contained in a minute signed by the two partners. W. J. Armstrong bound himself by the second clause to liquidate the business of the dissolved concern with all convenient speed; and from and after the date of the dissolution to take over and carry out for his own exclusive behoof and at his own risk the whole existing and unexpired contracts of the said company. The contracts of the 26th of June, 1872, had been completed as far as the delivery of the iron was concerned before the 31st of December, 1873. Five of the bills now forming the subject of dispute had been drawn on and accepted by Hannay & Sons, two on the date of 28th of November, 1873, and three on the date of the 30th of December, 1873; and those five bills were in the hands of the firm of Armstrong, Müller & Co. at the date of the dissolution. The payments to Armstrong, Müller & Co. for iron delivered by Armstrong, Müller & Co. to Hannay & Sons in the month of December, 1873, and the payments by Armstrong, Müller & Co., for the iron delivered to Armstrong, Müller & Co. by Vaughan & Co. in that month, under the two respective contracts of the 26th of June, 1872, did not fall due till the 30th of January, 1874. What other assets or liabilities of the dissolved firm existed at the time of the dissolution was not made a subject of inquiry at the trial. Probably there were others, but at least there were those. From the fourth article of the minute of dissolution it appears that a list of the bills was made out and signed, but it is not produced and neither party has thought it worth while to inquire for it.

That being the state of things on the 31st of December, 1873, the new firm of Armstrong Brothers commenced business on the 1st of January, 1874. This new firm consisted of Mr. William *John Armstrong (who was a part- [538

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ner in the firm of the dissolved firm of Armstrong, Müller & Co. and as such was liable on all the contracts of that firm, and who had by the minute of dissolution agreed to liquidate the concerns of the dissolved firm) and also of Mr. T. N. Armstrong, who was not a party to the minute of dissolution, and was not liable on any of the contracts of the dissolved firm.

My Lords, much of the argument at your Lordships' bar proceeded on ignoring the interest of T. N. Armstrong in the firm of Armstrong Brothers, and arguing as to the position of Armstrong Brothers in relation to the transactions subsequent to the 1st of January, 1874, as if that firm had consisted exclusively of William John Armstrong.

Mr. W. J. Armstrong in carrying out the liquidation of Armstrong, Müller & Co. employed his firm of Armstrong Brothers as agents to perform the necessary business, just as he might have employed a firm in which he had no personal interest. He indorsed in the name of Armstrong, Müller & Co. in liquidation the bills accepted by Hannay & Sons before the dissolution, and the bills drawn on the 30th of January after the dissolution and then accepted by Hannay & Sons, and delivered them to Armstrong Brothers who indorsed them in their own names and obtained a large sum on discount of those bills from the Clydesdale Bank. Armstrong Brothers no doubt would have to account for the sum they thus received. It appears that they made large payments on behalf of Armstrong, Müller & Co., in liquidation, and the sums which they thus paid, and the sums which they received from or on account of Armstrong, Müller & Co. in liquidation, including this sum received by the discount, would all form items in an account between Armstrong Brothers on the one side and Armstrong, Müller & Co. in liquidation (or perhaps Mr. W. Armstrong, the liquidating partner,) on the other. It seems to me not material which would be the party with whom the account was to be struck. This account has never, as far as appears, been adjusted, and neither party has thought fit to inquire what the state of the account was on the 28th of March, 1874, when Hannay & Sons were sequestrated. It is by no means clear that the balance was then against Armstrong Brothers, 539] even if the discounted bills had *been duly honored. On the 1st of April, 1874, the day after the two acceptances to bills drawn on the 28th of November, 1873, became due, Armstrong Brothers paid the amount to the Clydesdale Bank by a check of their own. Those bills have been retained in the possession of Armstrong Brothers ever since.

My Lords, it may be convenient to pause here and inquire whether on this 1st of April, 1874, the respondents were in a position to support a set-off in bankruptcy as far as regards the two bills then redeemed from the Clydesdale Bank. It was argued at your Lordships' bar that they had altered their position afterwards; with that I will deal subsequently.

Now, if I have correctly stated the facts, Armstrong Brothers were indorsers of those two bills, who on the sequestration of the acceptor, were compelled to take them up. They had a right of recourse against Armstrong, Müller & Co. who were indorsers prior to themselves. They had an unadjusted account with those indorsers, on which the balance might or might not turn out to be in favor of the indorsers. And those indorsers held a letter of indemnity from Vaughan & Co., to which Armstrong Brothers were not parties, but under which Armstrong, Müller & Co. might recover from Vaughan & Co. at least part of any loss which Armstrong, Müller & Co. might ultimately sustain from the discount of the bills.

I fail to see on this state of facts anything that could prevent Armstrong Brothers, then, from setting off the bills of which they were now holders against their debt to the estate of the acceptors. In the Court of Session an attempt seems to have been made to argue that an indorser of a bill, not in his hands and not due at the time of the sequestration, and who therefore at the time of the sequestration was not a creditor of the bankrupt, could not on taking up the bill, and becoming a creditor subsequently to the sequestration, avail himself of that set-off, but at your Lordships' bar that attempt was properly abandoned. It has for many years been decided, both in England and in Scotland, that if the indorser became a party to the bill before the bankruptcy in the one country or the sequestration in the other, he may set it off on becoming holder afterwards. See as to the English law, *Collins v. *Jones* ⁽¹⁾; as to the [540 Scotch law, 2 Bell's Com., p. 123, book v, chap. 4, sub-sect. 1, paragraphs 6, 2.

If, indeed, the holder receives payment from a prior indorser to him, and hands over the bill to him, he ceases to be a creditor, and can, of course, no longer set-off what is no longer a debt to him. For this, if an authority were wanted, *Belcher v. Lloyd* ⁽²⁾, which was cited at your Lordships' bar, is an authority. And the same effect would follow if it was made out that, though the bill was retained in

⁽¹⁾ 10 B. & C., 777.

⁽²⁾ 10 Bing., 810.

the hands of the indorsee, it had really been paid by a prior indorser. The fact that the indorsee retained possession of the bill being *prima facie* evidence that it was his property, and so casting the burthen of proof on those who maintain the contrary, but not being conclusive.

But there is no pretence for saying that, in the present case there was any evidence that on the 1st of April, 1874, Armstrong, Müller & Co. or their liquidating partner on their behalf, had taken up the bill in the hands of Armstrong Brothers. And though there was an unsettled account between Armstrong Brothers and Armstrong, Müller & Co. in liquidation, which, if the balance was in favor of Armstrong, Müller & Co. would have afforded facilities for enforcing by compensation and retention the claim of Armstrong Brothers against their prior indorser, that would not amount to payment; and there is neither authority nor principle for saying that the estate of the bankrupt acceptor has a right to require the holder of the bill to have recourse to any prior indorser before availing himself of his right to protect himself by compensation and retention in Scotland, or under the mutual credit clauses in England. All these remarks apply (*mutatis mutandis*) to the bills which became due respectively on the 3d of May and the 3d of June.

But Vaughan & Co. did on the 3d of April and the 3d of June pass to Armstrong Brothers two checks of £4,207 10s. each, on account of Hannay & Sons' unpaid acceptances for the iron delivered in October and December, 1873. And it was contended at your Lordships' bar that this had the effect, *pro tanto*, of satisfying the claim of Armstrong Brothers on the two sets of bills, *which from that time became in part the property either of Vaughan & Co., or of Armstrong, Müller & Co. The counsel did not care which, and if they could have made out either it would have raised their point. And they further said that though Armstrong Brothers never parted with the possession of the bills, yet that it was enough to defeat their right to a set-off if they had parted with the property in them.

My Lords, it would be enough to say that the burthen of showing that such a change in the property in the bills had taken place lay on the appellant, and that he has failed to satisfy that onus, but I think that when the evidence is examined on this point, it is made out affirmatively that no such change in the property did take place. It is to be remembered that T. Vaughan & Co. were not and never had been parties to the bills; and Armstrong Brothers had not and never had any right of recourse against T. Vaughan &

Co. Armstrong, Müller & Co. were parties to the bills, and Armstrong Brothers had a right of recourse against them; and Armstrong, Müller & Co. held the letter of the 23d of October, 1873, under which they might call on T. Vaughan & Co. to indemnify them from at least a part of any loss sustained by them in respect of the drafts discounted by them. T. Vaughan & Co. were under no obligation to prevent the bills coming back upon Armstrong, Müller & Co.; but they had a strong interest to prevent the bills coming back, if by so doing they could prevent Armstrong, Müller & Co. from sustaining loss, and they had a right to require Armstrong, Müller & Co. to do all that lay in their power to prevent any loss to them from occurring.

Mr. W. T. Armstrong was called as a witness for the pursuers, and Mr. George Neeshan, the managing partner of T. Vaughan & Co., was called as a witness for the defenders, and both swore that the two sums were advanced by T. Vaughan & Co. because Armstrong Brothers required some assistance to enable them to retain the bills and set them off against the claim of Hannay & Sons' trustee, and so prevent any loss. And it is quite clear that the second payment, on the 3d of June, 1874, must have been made with that view; for the present litigation had then commenced, and the respondents were defending the action with a view of *preventing any loss, which would in [542 part fall ultimately on Vaughan & Co., and neither party could have been so absurd as to intend to defeat the very object of the litigation.

The letters of the 2d, 3d, and 4th of April, 1874, show that at first Mr. W. T. Armstrong did not take the correct view of the effect of the letter of the 23d of October, 1873, and that Armstrong Brothers (or perhaps rather their clerk who wrote the letter of the 4th of April, 1874) thought that the two bills were to be delivered over by Mr. W. T. Armstrong to T. Vaughan & Co., when he met them on the Tuesday at Middlesborough. Had this been done there would have been ground for contending that T. Vaughan & Co. had then become purchasers of the bills, and that Armstrong Brothers had ceased to have any interest in them. But this was not done, there is no evidence on the face of the documents that T. Vaughan & Co. ever intended this, far less had bound themselves to this. As soon as the parties understood their real position they would wish not to do this, and I see no reason at all to doubt the veracity of the two persons who managed the transaction, and who both swear it was not done.

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It is quite true that the action is defended in the interest of T. Vaughan & Co., in so far that if Armstrong Brothers were obliged to prove these bills on the estate of Hannay & Sons, they would come upon Armstrong, Müller & Co. for as many shillings in the pound as the difference between 20s. and the dividend might amount to; and then T. Vaughan & Co. might be called upon to make good to Armstrong, Müller & Co. a part of this loss. And the Lord Ordinary seems to think that this prevented Armstrong Brothers from being interested in the bills⁽¹⁾.

My Lords, the whole of the judges in the Court of Session were of a different opinion, and I think the reason is tersely and accurately expressed by Lord Ormidale, who says, "I am not aware, and can neither find authority, nor see any good reason in equity or otherwise, for holding that the circumstance of a party having a cautioner or collateral security for his debt is destructive of his right of compensation or set-off, supposing it to be otherwise well founded"⁽²⁾. 543] *My Lords, if your Lordships take the same view of the facts as that which I have above expressed, I think you will come to the same conclusion, namely, that the interlocutor of the Court of Session should be affirmed, and this appeal dismissed with costs.

My Lords, I move accordingly that such should be the judgment of this House.

The Lord Chancellor, who has been obliged to leave the House on public business, and Lord Selborne who heard the argument, but is unavoidably absent, authorize me to say that they agree in this reasoning and the conclusion.

LORD GORDON: My Lords, I have merely to say that I entirely agree in the propriety of your Lordships adopting the judgment which has been proposed by my noble and learned friend. The case is one which did not give rise to the slightest difficulty on the part of any of the noble and learned Lords who heard it argued, in reference to the application of the law. It was simply for the purpose of having the facts stated more clearly and fully to the satisfaction of the House than could be done in an opinion orally delivered, that my noble and learned friend was requested to frame the exposition which he has just read to your Lordships.

Interlocutor complained of affirmed, and appeal dismissed with costs.

Agents for the appellant: *Murray, Hutchins & Co.*

Agents for the respondents: *Grahames & Wardlaw.*

⁽¹⁾ 4th Series, vol. ii, p. 404.

⁽²⁾ 4th Series, vol. ii, p. 414.

[2 Appeal Cases, 544.]

H.L. (Sc.), March 23, 1877.

[HOUSE OF LORDS.]

***ABERDEEN TOWN COUNCIL, Appellants; ABERDEEN [544
UNIVERSITY *et al.*, Respondents (¹).**

Per THE LORD CHANCELLOR (²): Where trustees acquire a benefit as ostensible owners of trust property, that benefit cannot be retained by them, but must be surrendered to those who are beneficially interested.

Per LORD O'HAGAN: The law of Scotland, equally with the law of England, condemns the misuse of a fiduciary position, and declares that any advantage wrongfully gained by a trustee shall enure to the benefit of the *cestui que trust*.

Per LORD O'HAGAN: Where a trust has been broken by the trustees for their own benefit, and to the injury of the *cestui que trust*, no lapse of time can validate the transaction.

Where the trustees of land affecting actual ownership acquire from the Crown a right of salmon fishing in the adjacent sea, the acquisition enures to the benefit of the *cestui que trust*.

Cause remitted back to the Court of Session to consider the question of retrospective accounting, as to which the House expressed no opinion.

By four separate deeds of mortification (³), dated respectively in 1613, 1616, 1622 and 1627, the sum of 12,000 marks Scots was assigned to the Magistrates and Town Council of Aberdeen upon trust for the benefit of certain professorships in the College of Aberdeen, now become by the 21 & 22 Vict. c. 83, the Aberdeen University. In 1704 the magistrates invested the 12,000 marks in the purchase of land, which was conveyed to their "Master of Mortifications," a municipal functionary, and his successors in office, for behoof of the beneficiaries under the several deeds of mortification or trust aforesaid. Thereafter the magistrates held and managed the property purchased, and applied the proceeds *thereof to the benefit of the professors, till 1797, [545 when the then Master of Mortifications, instructed by the magistrates, sold the land for a yearly feu duty of £50, the purchaser being in fact an agent of the magistrates, who surrendered to them the property so purchased, and they were in due time infeft in it under a charter from their own Master of Mortifications, the whole transaction being represented as a municipal "scheme" by which the Town Council enhanced largely its property and income, but restricted the professors to the yearly feu duty of £50.

In 1801 the magistrates applied to the Lords of the Treasury for a grant of the salmon-fishings in the sea opposite the lands which they had purchased. A Crown charter of

(¹) Modifying Scotch Cases, 4th Series, vol. 3, p. 1087.

(²) Lord Cairns.

(³) Mortmain, or trust.

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the solicited fishings was accordingly granted to them; and on the strength of it the magistrates now receive from the fishings a yearly rental of £605, while they also receive from the land itself £170 yearly. These two sums, making together £775, have been by the magistrates applied exclusively to municipal purposes, the professors for whose benefit the whole was originally intended receiving only the annual feu duty of £50.

On the 2d of December, 1873, the University of Aberdeen, with its professors and others interested, brought the present action against the Magistrates and Council of the Royal Burgh and City of Aberdeen, asking a declaration to the effect that the fictitious sale of 1797 was a nullity, and also praying a reduction of the grant from the treasury, with a retrospective account of the rents and profits of the land sold, and of the fishings, from the term of Martinmass, 1833, being the prescriptive period of forty years anterior to the date of the summons.

The magistrates put in their defence, denying that the feu duty was inadequate, but, on the contrary, was more than sufficient for a long time after the sale, and stating that the University authorities were fully conusant of the transaction.

The case came in due course before the Lord Ordinary ('), who, on the 25th of November, 1874, pronounced an interlocutor finding that the lands in question were possessed by the magistrates subject to the trusts of the mortifications, and that the beneficiaries were entitled to the whole income [546] subsequent to the *date of the summons, but that they were not entitled to a retrospective account of rents and profits; and with respect to the fishings, finding that the University of Aberdeen had "no right or title thereto."

The Aberdeen University presented a reclaiming note to the First Division of the Court of Session, by whom, on the 18th of July, 1876, the following judgment was pronounced:—

Find that the lands purchased in 1704 by the Corporation of Aberdeen with funds belonging to the mortifications were sold by the corporation, as trustee for the mortifications, to the said corporation, for its own behoof, in consideration of a feu duty of £50: Find that the said sale was illegal and void, and that the corporation, in entering into the illegal transaction aforesaid, acquired, or attempted to acquire, the said lands for the purpose of being thereby enabled to apply to the Commissioners of His Majesty's Treasury for a grant in favor of the corporation of the salmon-fishings in the sea *ex adverso* of the said lands: Find that, in pursuance of such purpose, the corporation in the year 1801 presented a petition to the Lords of the Treasury, setting forth that they were the

(¹) Lord Young.

absolute proprietors of the said lands in their own right, and on that ground praying for a grant of salmon-fishings in the sea *ex adverso* of the said lands, for the benefit of the corporation: Find that the prayer of the said petition was granted, and a Crown charter in favor of the corporation, conveying the said salmon-fishings was expedite: Find that the corporation have ever since possessed, and do now possess, the said salmon-fishings, in virtue of the said charter: Find that the corporation being the trustee for said mortifications, having thus used the trust estate for the purpose of obtaining a benefit to themselves, are bound to communicate that benefit to the trust estate and the parties interested therein, and are bound to hold and administer the said salmon-fishings as part of the said trust estate, and to apply the revenues and profits thereof to the benefit of the parties interested, as beneficiaries in the said mortifications: Find that the concurring pursuer, Dr. W. R. Pirie, is entitled to a share of the revenues and profits of the trust estate, corresponding to his tenure of the professorship of Divinity and Church History from December, 1843, the date of his appointment, till the date of citation: Find also, under the petitory conclusions, that the late John Cruickshank, as concurring pursuer, was, and his representatives who have been sisted in his place, are entitled to a share of the profits and revenues of the trust estate, corresponding to his tenure of the professorships of mathematics, from or about the year 1833 till the year 1858: Find that the said shares of the profits and revenues of the trust estate for the said periods may competently be ascertained and decerned for in the present action: Find the pursuers entitled to the expenses hitherto incurred by them, and remit to the Auditor to tax the account: Remit to the Lord Ordinary to proceed with the accounting in accordance with the above findings, and to proceed further as shall be just, with power to decern for the expenses now found due⁽¹⁾.

Recal the Lord Ordinary's interlocutor.

*Against this judgment the Aberdeen magistrates [547] appealed to the House, having for their counsel *The Lord Advocate* and Mr. Cotton, Q.C. (with them Mr. Keir, of the Scotch bar). Relying on the doctrine of prescription, they contended that the feu contract of 1797 was a *bona fide* transaction, under which the community of Aberdeen had possession for forty years and upwards. As to the salmon-fishings, the appellants' counsel insisted that they were granted by reason of royal favor to the town of Aberdeen, which had possessed them without objection for forty years and upwards. And by the law of Scotland they urged that trustees were allowed to plead the negative prescription against the challenge of a transaction of forty years' standing⁽²⁾.

Mr. Southgate, Q.C., Mr. Asher (of the Scotch bar), and Mr. W. A. Hunter appeared for the respondents, and maintained that prescription could not be pleaded in answer to a charge of breach of trust: *Baird v. Magistrates of Dundee*⁽³⁾; *Magistrates of Dundee v. Presbytery of Dundee*⁽⁴⁾. The respondents' counsel claimed also for the respondents the arrears of the rents and profits which had been received

⁽¹⁾ 4th Series, vol. iii, p. 1087.

⁽²⁾ 24 Dunlop, 447.

⁽³⁾ *Marshall v. Lyall*, February 18, 1859; 19 Dunlop, 626.

⁽⁴⁾ 4 Macq., 228.

by the magistrates and misapplied by them; and cases were cited as examples (').

THE LORD CHANCELLOR ('): Your Lordships desired time for further consideration, not, I venture to think, from any doubt as to the conclusion at which you should arrive on the main question in the case, but in order that you might be the better prepared to dispose of what I may term a subsidiary question, which was raised, and I think raised for the first time, during the argument at your Lordships' bar.

The action in the Court of Session against the Aberdeen Town Council had both declaratory and petitory conclusions. So far as the declaratory conclusions were concerned 548] the nature of the case *may be very shortly described. The principal officers of the corporation of Aberdeen, whom I will call for brevity the Town Council of Aberdeen, were the trustees of certain mortified funds which were intended to provide for the maintenance of two professors in the Aberdeen University. These mortified funds were laid out, together with other funds, which for the present purpose I will disregard, in the purchase of a certain property lying along the sea coast in the neighborhood of Aberdeen. Of that property, so far as it represented the mortified funds, the Town Council were undoubtedly trustees for the University and its professors. A considerable time ago, at the end of the last or the commencement of the present century, a transaction occurred the nature of which may be described in this way: A considerable part of the property had been feued off by the Town Council to various persons, but one portion of it, adjacent to the sea coast, remained in their hands; and as to it, that which I may call little else than a ceremony, was gone through by which they proposed to sell it to a gentleman, who immediately afterwards declared that he had bought it as, and held it as, trustee for the Town Council. The result therefore was that the Town Council, being, as we should say, trustee of charity land, went through the form of selling that charity land to the corporation itself, feuing the land for £50 a year.

My Lords, very shortly afterwards the Town Council applied to the Crown, holding the right of salmon-fishing *inter regalia*, to grant to the Town Council, as the proprietors of this land, the right of salmon-fishing in the sea *ex adverso* the land in question, and they based their application upon a narrative which represented the Town Council as having

(¹) *The York Buildings Company*, 3 8 Dunlop, 400; *Gillies v. MacLachlan's Paton's Appeals*, 378 and 579; *Jeffrey v. Representatives*, 8 Dunlop, 487.
Aitken, 4 Shaw, 722; *Taylor v. Watson*, (²) Lord Cairns.

acquired this land for the purpose of asking the right of salmon-fishing from the Crown, which was in the habit of giving the right of salmon-fishing to the proprietors of the riparian land. Thereupon, in accordance with what was the practice at that time, an Exchequer grant was made by the Crown of the salmon-fishing *ex adverso* nearly the whole, though not quite the whole, of the coast of the property to which I have referred.

Now, my Lords, upon that part of the case I do not enlarge, because it is fully described in the very able judgment of the *Lord President (¹), and your Lordships, I [549 think, have no doubt that the transaction is one which would not for a moment be entertained by any court as a dealing with trust property by a trustee. I refer, in the first place, to the feuing out of the land, which counts for nothing as against those who are beneficially interested. They are entitled to disregard it and treat it as if it never had happened. And then again with regard to the salmon-fishings, it is one of the first principles in regard to the doctrine of trusts,—a principle founded upon no technical rule of law, but upon the highest principles of morality,—that wherever a trustee, being the ostensible owner of property, acquires any benefit as the owner of that property, that benefit cannot be retained by himself, but must be surrendered for the advantage of those who are beneficially interested. Now it is perfectly apparent that this right of salmon-fishing was claimed by the Town Council because they were the owners of the land; it is perfectly apparent that it was granted to the Town Council because they were the owners of the land; it is perfectly apparent that it would not have been granted to them if they had not been the owners; and under those circumstances, it appears to me clear to demonstration that their reception of the grant of the salmon-fishings is exactly one of those benefits which came to them as the owners of the land, and must be surrendered for the advantage of those who really are the persons interested in the land.

My Lords, I will not detain your Lordships longer upon that part of the case. I agree with every word which fell from the Lord President in describing the case, and I did not really think that the very able counsel who appeared at your Lordships' bar on behalf of the Town Council were otherwise than oppressed with the difficulty of the case which they had to argue.

But then, my Lords, there remain the petitory conclusions of the summons, in which the two professors, for whose ad-

(¹) 4th Series of Scotch Cases, vol. iii, p. 1093.

vantage these funds were mortified—or, rather, I should say, one of the professors, and the representative of the other, who had died—claimed in their own person to have an accounting and payment of the real value of the lands and of the salmon-fishings in place of that feu duty of £50 a 550] year which had annually been accounted for to *them. With regard to these petitory conclusions, one question, and as it seems to me only one question, was really argued in the court below. It was doubted whether the professors could join in this suit for the purpose of maintaining these petitory conclusions. The Court of Session held that they could so join; and I see no real or substantial reason why they could not join. With regard to the practice in this country, your Lordships are well aware that it is of every day's occurrence that you find an information dealing with a charity, filed by the Attorney-General, as representing the charity, and, coupled with that, a bill (the whole proceeding being termed an information and bill), by the individuals connected with the charity who conceive that they have some claim to a personal and particular advantage from the charity. In principle it seems to me that exactly the same thing has been done in the present case. In Scotland, where it is not the habit for the Lord Advocate to sue as the Attorney-General sues in this country with regard to charities, the University may be taken as representing the general claim on behalf of the charity, and the professors joining in the petitory conclusions, represent the individuals who ask for the specific relief to which they claim to be entitled. Therefore, so far as the Court of Session held that the joining in these petitory conclusions was right, I think your Lordships will be disposed to agree with that view.

But then it was said,—Here is an accounting directed for the profits of this land and fishing; and there is no limit assigned to it beyond, at the most, the Scotch limit of prescription—forty years; and it was urged that that might involve a very great hardship. Here (it was said) is a public body, who, whatever may be said of the authors of this transaction, are not affected by any personal culpability; and they have been from year to year dealing with the property of the Town Council upon the footing of that transaction. It may be that the money has all been spent; it may be (it was said), that there is no property of the Town Council to answer a judgment of the kind which would be given here; and it may be (it was further said), that the result will be, that the present members of the municipality, the town and community, will have to be taxed to make

good money which was spent not by them but by those who went before them.

*My Lords, I do not find that any argument upon [551] this subject took place in the court below, nor that any reference has been made to it in the condescendence or in the pleadings. I do not find even in the reasons of appeal before your Lordships' House, that any specific reference is made to the subject. There is no doubt that in England there have been many cases where upon reclamations made for the recovery of charity property which has been improperly applied, some consideration has been shown in the decree with regard to the past expenditure of the charity money; and there have been cases in which the account of back rents or back receipts of the charity funds has been limited, sometimes to the period when first the misappropriation was challenged, and sometimes to the filing of the bill for the recovery of the charity estate. I do not find, so far as I have been able to investigate the subject, that there are any authorities (and none were cited at the bar) in the Scotch law upon the subject. I do not wish, and I think your Lordships would not wish, to indicate any opinion whatever as to whether the doctrine which, in the way I have described, has prevailed in England, has ever been extended, or ought to be extended to Scotland; but I think it was certainly your Lordships' feeling that, without in any way prejudicing this question, or in any way using expressions which would indicate that your Lordships had any opinion formed upon the subject one way or the other, it might be desirable that the matter should, if it were possible to do so, be left open for further consideration by the Court of Session, in case it might appear to the Court of Session, upon their attention having been specifically directed to the subject, that any modification in the general account should be made with reference to the considerations to which I have adverted.

My Lords, any mode which your Lordships might adopt for effecting this purpose ought not in my opinion to affect in any way the costs of the litigation in this House. It appears to me that the appeal upon the grounds upon which it was brought has entirely failed, and I should submit to your Lordships that the interlocutor complained of should be affirmed with costs. But, in order that the Court of Session may have an opportunity of having their attention drawn to the question of the accounting, I should propose to your Lordships, in affirming the interlocutor of *the [552] First Division with costs, to remit the cause to the Court of

Session with directions before proceeding with the accounting ordered by the interlocutor to allow the appellants to amend the record and their pleas with reference to the extent of their liability to account, and to allow the respondents to make such alterations as may be rendered necessary by those made by the appellants, and thereafter to proceed further in the cause as shall be just, with power to dispose of all questions of expenses incurred under this remit. And I move your Lordships accordingly.

LORD HATHERLEY: My Lords, the magistrates of Aberdeen appear to have been trustees for certain endowed professorships of certain funds which were placed within their control for that purpose, just as in this country many corporate bodies, notably the corporation of London, are trustees for many great public charities, holding funds entirely distinct for those purposes. No doubt was raised in the argument of counsel upon the main part of the case as regarded the landed portion of the property.

But, my Lords, a subordinate question arose with respect to the fisheries. That question was whether, the fisheries being a subsequent purchase, made, as was alleged, out of the municipal funds, the corporation could not hold those fisheries independently of any principle which might be applicable to the general bulk of the property. There might be something to be said for that; and two cases were cited which seemed to have some bearing upon the present until all the facts were carefully weighed. But when you come to look at the representations made to the Crown anterior to this grant, you find that it is plainly and distinctly stated in those representations, that the very object of the corporation in obtaining the trust property was to have from the Crown the grant of these fisheries, because the Crown had laid down for itself the principle that it would make the grant of the fisheries to the persons holding the adjacent land. There was therefore a distinct and well-known benefit to be derived from the possession of the trust property, namely, the obtaining of a grant from the Crown of those fisheries in the seas adjacent to the trust property, which, according to the rule which the Crown has laid down for 553] *itself, were to be granted to the owners of the adjacent property. It was as owners of the trust property that the fisheries were granted to the corporation.

Now, my Lords, two cases—two remarkable cases I may say—were cited, but they appear to me to have no bearing upon the present case. The one was the case of *Hardman*

v. *Johnson* ⁽¹⁾, before Sir William Grant. The other case was *Acheson v. Fair* ⁽²⁾, before the late Lord St. Leonards. No doubt the authority of both those learned judges is very great; and, had the circumstances been in any way really analogous to those of the case now before us, I might have paused before coming to a conclusion. But they were not analogous. The case reported in *Merivale* was the case of a purchase of a reversion of certain leasehold lands which, under the circumstances, were considered to be held upon a trust; that reversion was of those leaseholds together with many other properties which the parties who had purchased said they had purchased wholly irrespective of the trust on which a small part was held. The second case was a similar one; because there also the fact was that a reversionary interest in the land in question had been acquired with a large general purchase of land. Those being the special facts of those two cases it was attempted to draw a distinction in regard to them, and to take them out of the general rule which I have mentioned, namely, that a trustee cannot possibly derive any benefit from property which he holds in trust. If those cases went at all beyond that principle, I have no hesitation in saying that the cases must themselves be erroneous. But I am quite confident that neither of those learned judges meant in any way to impugn the general principle I have mentioned; and I am quite confident that the decisions in those cases could not be applied to a case in which, according to the statement of the parties themselves, the benefit of the acquisition of the fisheries has been entirely derived from the possession of the trust property; and the trust property was really acquired for the very purpose of getting those fisheries. Therefore the case, as regards this part of it, is one of the simplest and plainest that could be brought before your Lordships for decision.

The other part of the case I confess would have caused me some *difficulty, because in truth we are so little [554 provided with materials with reference to the back account for a period of forty years; we have not had any argument before the learned judges in the court below, or their opinions, which would be the most valuable aid, of course, that could be afforded us; and we have not had the point raised clearly and distinctly upon the pleadings before us. Under all the circumstances the course suggested by my noble and learned friend on the woolsack seems to me to be the only one which it is competent for your Lordships to adopt.

⁽¹⁾ 3 Mer., 347.

⁽²⁾ 3 Drury & War., 512.

LORD O'HAGAN: My Lords, I am of opinion that the unanimous judgment of the Lord Ordinary and the Court of Session, on the first point in this case, should be sustained; and that the judgment of the Court of Session on the second point, in which it conflicts with that of the Lord Ordinary, should also be sustained.

On the first point, I think there is really no room for doubt. There is admittedly a trust estate. The appellants are trustees and the respondents are *cestuis que trust* under certain deeds of mortification executed in the early part of the seventeenth century. The predecessors of the appellants administered their trust faithfully until the year 1797. But the officer who acted for them in the administration, who was called the Master of Mortifications, on the 14th of September in that year, conveyed lands which were so held in trust, in consideration of a feu duty of £50 a year, to their own treasurer, after a sale at which their own provost presided, for their present benefit and with a purpose of further aggrandizing their corporation. Ever since, they have kept possession of the property and the advantages accruing upon that possession; and the respondents now impeach the sale as absolutely void, and claim that the trust shall be executed and the trust estate enjoyed by the beneficiaries to whom it was destined by the deeds of mortification.

It seems to me that the simple statement of the facts of this strange and indefensible transaction is sufficient to stamp it with illegality. The principle which forbids a trustee "to traffic in his trust" belongs to the jurisprudence of all nations. It is equally effective in Scotland as in Eng-555] land. "Tutors and their factors" *(says Lord Stair) "are presumed to do that, to the behoof of the pupil, which they ought to do; and though it be done '*proprio nomine*' it accresceth to the pupil." And in this case the law of Scotland, equally with the law of England, condemns the misuse of a fiduciary position, and declares that the advantage wrongfully gained by the trustee shall enure, not to his benefit but to that of the *cestui que trust*. It will not tolerate an attempt to employ a power, created in the expectation of its honest exercise, for the betrayal of those whom it was designed to protect. The appellants contended that, whatever might have been the weakness of their title when it was created, the lapse of time had given it validity. But the trust was express. It was violated by the trustees for their own benefit and to the injury of the *cestuis que trust*; and there is no principle in the law of Scotland which per-

mits lapse of time, under such circumstances as exist in this case, to validate a transaction so essentially illegal and void. In this conclusion all the judges have concurred; and your Lordships can have no hesitation in adopting it.

I think you may have as little, in affirming the judgment of the majority as to the fishings. The ruling of the first point seems to me to rule the second; and if the lands are affected by the trust so as, notwithstanding the nominal transfer of title and the great lapse of years, to belong still to the beneficiaries, the fishings appear to me to be affected in the same way and with a like result. The breach of trust which is now confessed was committed for the purpose of securing a right to the fishings. The corporation declare over and over again that they contracted for the lands illegally, and paid, through their treasurer on the one hand and their master of mortifications on the other,—that is from themselves to themselves,—the stipulated price, with the express view of obtaining a grant of the sea-fishings *ex adverso* of those lands. The petition to the Lords of the Treasury for the grant of the fishings rests the claim to it on the fact that the lands, so illegally obtained, were opposite to those fishings. The report of the Exchequer judges, authorizing the grant, relies on the adjacency of the purchased lands as being its proper warrant, and the right is conferred by the Crown "*in mari adjacente terris.*" Therefore it is plain that the land was unlawfully purchased by the trustees for the *purpose of founding a claim to the fishings; [556 that the possession of that land was made the ground of the claim and admitted as such by the Crown; and that, without the land so acquired by an admitted breach of trust, no grant of the fishings would have been obtained.

It is true, as the Lord Ordinary has said, that "the fishings were undoubtedly granted to the burgh, and the Crown is not seeking on the ground of misrepresentation, or on any other ground, to rescind the grant." But, if the grant was plainly made, because of the possession of lands which would have given a right to the beneficiaries, and gave no right whatever to the trustees, to whom it was unlawfully conceded, why should not the restoration of the land to its true owners involve the restoration of the fishings, which the trustees managed to obtain by the false pretence of a title which never belonged to them? Confessedly, if the true state of the case in fact and law, as it has been established by the Court of Session, had been known, the practice of the Crown would have given the fishings to the *cestuis que trust*, as the adjacent proprietors, and not to the trustees

who had, legitimately, no interest, corporate or personal, in the matter. And if your Lordships should be right in holding, as to the first branch of the case, that the lapse of time does not alter the rights of the parties, what belonged to the *cestuis que trust* in 1801, belongs now to their successors: and the fishings should be held subject to the trusts of the mortifications as well as the land, in virtue of the possession of which those fishings were manifestly granted. Without the land, the corporation would not have got the fishings; and if their title to the land is void, their title to the fishings must fail along with it.

We must deal with the land and the fishings on the same principles; and the benefit which has arisen in connection with, and by reason of, the possession of the trust estate, which belonged to the beneficiaries and not to the trustee, under the mortifications, must go to those who represent the beneficiaries. We must hold that the trustee secured that advantage, not for himself, but for those whose interests he was bound to guard, in utter forgetfulness of his own. It would be a reproach to the law, if it were powerless in 557] such a case to prevent a trustee from **“making commodity of his own wrong,”* and holding a property he had gained only by a gross breach of duty. But it is not so: and your Lordships will again enforce the doctrine declared by a distinguished Scottish judge⁽¹⁾ who was once a member of this House, in the case of *Laird v. Laird*⁽²⁾: “The law will ever presume that the trustee intended that the profits should go to the beneficiary rather than presume that he intended his own aggrandizement at the risk or expense of the beneficiary.”

As to the petitory conclusions, I think that your Lordships will do well to adopt the proposal of my noble and learned friend on the woolsack, and for the reasons he has given.

LORD BLACKBURN: My Lords, I also am of opinion that upon the main question there can be no doubt that the judgment of the court below ought to be affirmed. Upon that I will say no more than that I think the reasoning given in the very clear judgment of the Lord President is quite irresistible.

Upon the minor point of the petitory conclusions, with regard to the question as to how far it is right that the account should go back, I quite agree with the Lord Chancellor that it is hardly raised by the record, and that it has hardly been considered below. The hardship upon either

⁽¹⁾ Lord Colonsay.

⁽²⁾ 20 Dunlop, 981.

side is very obvious. On the one hand, the appellants being a fluctuating body, if the result of taking an account back for forty years is to make the occupiers of ratable property in Aberdeen in 1877 pay the money that has been spent by their predecessors in 1837 and downwards, the hardship is great. On the other hand, the hardship is obvious and great if the professors, or the representatives of the professors, who ought to have had that money, lose it because they did not know that they ought to have had it. I do not think that question has been properly raised or considered. It is very desirable that the rule, whatever it may be, should be ascertained, and therefore I entirely concur in the propriety of the remit which, as I understand it, will leave the Court of Session at liberty to consider the question, and to do what, after considering the principles of Scotch law *and the decisions in Scotland, if there be any, shall [558 seem to them to be just and right.

LORD GORDON: My Lords, I am happy to say that the views which your Lordships are now adopting are quite in accordance with the principles of Scotch law. In fact, our Scotch law is founded on the civil law, and has adopted to the full extent the restriction upon any dealings on the part of trustees with trust property. That principle had been applied in several Scotch cases, even before the question was raised in England. I have no doubt whatever, therefore, that your Lordships are dealing correctly in affirming the judgment upon the declaratory conclusions.

The petitory conclusions may admit of some further discussion; and I think an indulgence is conceded to the appellants in this case in allowing them to have an opportunity of stating more fully the facts of the case which are necessary to raise some of the arguments which were submitted to your Lordships from the bar. It is quite clear that upon the record there are neither statements of fact nor pleas in law sufficient to support those arguments; and it would not be safe for your Lordships to deal with this branch of the case upon the very meagre argument which was submitted at the conclusion of the case. I think, therefore, that your Lordships will deal correctly in remitting the cause to the court below, giving power to the court below to allow amendments upon the record with regard to any questions which may be raised as to the extent of the accounting under the judgment upon the petitory conclusions. Of course the remit will be expressed in such terms as will leave the matter perfectly open to the court below, for your Lordships have not expressed any opinion with

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reference to what may be the views that you might be ultimately inclined to take in regard to the case when it shall be matured by the amendments.

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Ordered and adjudged, that the interlocutor of the Lords of Session of the First Division of the 18th of July, 1876, complained of in the said appeal, be and the same is hereby affirmed, *except as regards the extent of the liability to account; and as to such accounting, and without prejudice to any question, it is ordered and adjudged that the cause be remitted back to the Court of Session with directions, before proceeding with the accounting ordered by the said interlocutor, to allow the appellants to amend the record and their pleas with reference to the extent of their liability to account; and to allow the respondents to make such alterations as may be rendered necessary by those made by the appellants; and thereafter to proceed further in the cause as shall be just; with power to dispose of all questions of expenses incurred under this remit: And it is further ordered, that the appellants do pay or cause to be paid to the said respondents the costs incurred by them in respect of the appeal.

Agents for appellants: *Martin & Leslie.*

Agent for respondents: *William Robertson.*

If an agent, executor or administrator, attorney, trustee, etc., purchase directly or indirectly the trust property, or make an agreement for his own benefit contrary to his duty to his principal or his *cestui que trust*, he will, at the election of his principal or *cestui que trust*, be held to have made such purchase or agreement for the benefit of his principal or *cestui que trust*, and to have so held the proceeds of such purchase or agreement: 10 Eng. Rep., 516 note; 11 Eng. Rep., 112 note; 11 Eng. R., 483 note; 19 Id., 719 note; 1 Perry on Trusts, §§ 427 *et seq.*; 1 White & Tudor's Lead. Cas. in Eq., 62 *et seq.*

Canada, Upper: Robinson v. Coyne, 14 Grant's Chy., 561; Harrison v. Harrison, 14 Grant's Chy., 586; McCann v. Dempsey, 6 Grant's Chy., 192; Henderson v. Smith, 2 Err. and App., 9, affirming 6 Grant's Chy., 306; Graves v. Henderson, 8 Grant, 1; Hewson v. Smith, 17 Grant, 407; Howard v. Har-

ding, 18 Grant, 181; McCann v. Dempsey, 6 Grant, 192; Davis v. Hawke, 4 Grant, 394; Grantham v. Hawke, Id., 582.

See McRory v. Henderson, 14 Grant, 271.

Though the court may refuse in a proper case to set aside a conveyance to the trustee: McKnight v. McKnight, 12 Grant, 363.

So where a lawyer did not act professionally but as a friend only: Paul v. Johnson, 12 Grant's Chy., 474.

Florida: Price v. Winter, 15 Florida, 66.

As to how far such a purchase allowed to stand when third person also interested therein, see Price v. Winter, 15 Florida, 66.

Illinois: Fish v. Leser, 69 Ills., 394; Tewksbury v. Spruance, 75 Ills., 187.

Iowa: Read v. Howe, 39 Iowa, 553.

Irish: King v. Anderson, Irish Law Rep., 8 Eq., 625, reversing Id., 147.

Maryland: Cumberland, etc., v. Parish, 42 Md., 598.

Nor can the same attorney represent two defendants in the same proceeding where their interests are hostile: *Martindale v. Brock*, 41 Md., 571.

Michigan: Humphrey v. Hurd, 31 Mich., 436.

Missouri: Mitchell v. McMullen, 59 Mo., 252.

New Jersey: Blackwell v. Blackwell, 29 N. J. Eq., 576.

New York: Star, etc., v. Palmer, 41 N. Y. Superior Ct. Rep., 267; *Darrow v. Fanning*, 2 Johns. Chy., 252; *Hawley v. Cramer*, 4 Cow., 717; *Voltz v. Blackmar*, 64 N. Y., 440, 447; *Spelman v. Terry*, 8 Hun, 205; *Howell v. Ransom*, 1 N. Y. Leg. Obs., 10; *Newton v. Porter*, 69 N. Y., 133; *Justh v. National*, etc., 56 N. Y., 478.

When allowed, what paid for tax title outstanding against *cestui que trust*: *Spelman v. Terry*, 8 Hun, 205.

Pennsylvania: First, etc., v. Bache, 71 Penn. St. Rep., 218; *Arnold v. McCungie*, etc., Id., 287.

United States: Wormley v. Wormley, 8 Wheat., 441.

While an attorney is not permitted to acquire property in the exercise of bad faith toward his client, yet the attempt of the latter to defraud him of reasonable compensation will authorize him to sever the relation and act for his own protection.

Where the client refused, for four years, to pay the attorney for fees and reimburse him for expenses incurred in an action to foreclose a mortgage, and the mortgaged land was afterwards purchased by the attorney at tax sale, the client being informed of the sale and failing to pay the amount thus advanced: Held, that the client would not be permitted, seven years thereafter, to maintain an action to set aside the tax deed: *Eckrote v. Myers*, 41 Iowa, 324.

The mayor or an officer of a city is within the rule forbidding a trustee from purchasing property of his *cestui que trust*: 18 Eng. R., 398 note; *Brannus v. Peoria*, 82 Ills., 11; *Commonwealth v. Shepp*, 1 Leg. Chron. Rep., 325.

And so directors and managers of corporations and other companies.

See letter of Sewell, Vanderpoel and Bennett, and cases cited, 9 Chicago Leg. News, 31.

Canada, Upper: Greenstreet v. Paris, 21 Grant's Chy., 229; *Toronto v. Bowes*, 4 Grant, 489, affirmed 6 Id., 1; *Collins v. Swindle*, Id., 282.

Illinois: Gilman, etc., v. Kelly, 77 Ills., 426.

The rule has been considerably qualified in this state where the directors act in good faith, giving all stockholders an equal opportunity: *Harts v. Brown*, 77 Ills., 226.

Maryland: Cumberland, etc., v. Parish, 42 Md., 598.

Massachusetts: Parker v. Nickerson, 112 Mass., 195.

New York: Coleman v. Second Av. R. R., 88 N. Y., 201.

Ohio: Godin v. Cincinnati, etc., 18 Ohio St., 169.

United States: Jackson v. Lude-ling, 21 Wall., 616.

A director may lend his corporation money and take security therefor if needed for its benefit, and the transaction is open and otherwise free from blame: *Twin, etc., v. Marbury*, 91 U. S. Rep., 587.

The trustees of a corporation cannot, at a meeting regularly and duly convened, act for the corporation so as to bind it for an adverse interest of their own: 11 Eng. Rep., 484 note; 13 Id., 758, 759 note; *United Brethren, etc., v. Vandusen*, 37 Wisc., 54; *Emporium, etc., v. Emrie*, 54 Ills., 345.

The directors of a joint stock company having in good faith and for sufficient consideration mortgaged the property of the company in favor of themselves, held that although the mortgage could not of itself bind the company, yet that it was not absolutely but only relatively null. Held, also, that although a certain deed of ratification was necessary to give validity to the mortgage, yet that it was not necessary to register such deed: *Pratte v. La Manufacture, etc.*, 2 Quebec Law Rep., 65.

Though after the termination of the agency, trust, etc., the agent, trustee, etc., have the same right as any other persons to deal in the property.

Canada, Upper: McLennan v. McDonald, 14 Grant's Chy., 61; *Rees v. Wittrock*, 6 Grant, 418.

United States: Walker v. Derby, 5 Bissell, 134.

The agency of a real estate agent and his duty to his principal ceases upon

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the delivery of the title papers and payment for the property: *Walker v. Derby*, 5 Bissell, 134.

The agent, trustee, etc., may purchase of the principal personalty, if there be no unfair practice on his part to procure the sale.

Canada, Upper: And an attorney will not be allowed to set up the statute of frauds as a defence: *Fleming v. Duncan*, 17 Grant's Chy., 77.

Maine: *Burleigh v. White*, 64 Maine, 23.

Maryland: *Roman v. Mali*, 42 Md., 514.

New York: *Graves v. Waterman*, 63 N. Y., 657.

Otherwise, where there is a concealment of any material fact or unfair advantage taken of the relation of agent, trustee, etc.

Canada, Upper: *Hope v. Beard*, 8 Grant's Chy., 380.

Mississippi: *Tatum v. McLellan*, 50 Miss., 1.

The burthen of proof is upon a party holding a confidential or fiduciary relation, to establish the perfect fairness, adequacy, and equity, of a transaction with the party with whom he holds such relation; and that, too, by proof

entirely independent of the instrument under which he may claim.

Canada, Upper: *Harrison v. Harrison*, 14 Grant's Chy., 586; *Hope v. Beard*, 8 Grant, 380; *McCann v. Dempsey*, 6 Grant, 192; *Oakes v. Smith*, 17 Grant, 660; *Davis v. Hawke*, 4 Grant, 394; *Grantham v. Hawke*, Id., 582.

Maryland: *Cumberland, etc., v. Parish*, 42 Md., 598; *Roman v. Mali*, 42 Md., 514.

New York: *Graves v. Waterman*, 63 N. Y., 657; *Whitehead v. Kennedy*, 7 Hun, 230; *Evans v. Ellis*, 5 Den., 640; *Brock v. Barnes*, 40 Barb., 521; *Ford v. Harrington*, 16 N. Y., 285.

Where a trustee purchases the property of his *cestui que trust*, the title passes subject to the right of the *cestui que trust* to ratify and confirm that title or to compel the conveyance thereof by the trustee, upon a proper case being made in a court of equity for that purpose.

To enable the *cestui que trust* to avoid a sale made by the trustee, he must apply within a reasonable time after notice, or his right of repudiation will be gone: *Holman v. Holman*, 66 Barb., 216; *Twin, etc., v. Marbury*, 91 U. S. Rep., 587.

[2 Appeal Cases, 589.]

J.C., May 5, 9, 1877.

[PRIVY COUNCIL.]

589] *HOARE and Others, Appellants; and THE ORIENTAL BANK CORPORATION, Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Bankruptcy—Proof against Partnership Estate in respect of Joint Debts.

H. and C. having with W. S. and two other persons for themselves and each of them, and any two, three, or four of them, jointly and severally bound themselves to the respondent in a large sum of money to secure advances to be made to W. S.; H. and C., who carried on business in partnership, were adjudicated insolvents, both in respect of their separate estates and their joint estate, upon their own application, under the local Insolvent Act.

C. and H. each entered the debt (which was unconnected with their partnership business) to the respondents under the bond in the schedule of his separate estate. The respondent was subsequently admitted to prove the same against the joint estate:

Held, that, under the bankruptcy law of England as it existed in 1841, which had been introduced into the colony concurrently with the Insolvent Act, the respondent was properly admitted to prove against the joint estate *pari passu* with the partnership creditors.

No distinction can be drawn between joint debts so as to exclude from proof

against the joint estate of any joint debt which is not shown to have been incurred in the strict sense of the term as a partnership transaction, and as arising out of partnership business, either under the said bankruptcy law or under sects. 4 or 17 of the Insolvent Act.

As the Bankrupt Act has been repealed, the head-note of this case only is given. N. O. M.

[2 Appeal Cases, 616.]

H.L. (E.), March, 25, 26, 1877.

[HOUSE OF LORDS.]

*JESSE JONES, Appellant; and JOHN GORDON, Re- [616
spondent (¹).

Bankruptcy—Bills of Exchange—Fraud.

By arrangement previously made between the parties, G. drew bills on S., and S. drew bills on G.; the acceptances were, in form, duly given. Both G. and S. were at the time, and were known by each other to be insolvent, and to be contemplating bankruptcy. Some of these bills, amounting to £1,727, were purchased by J. for a sum of £200. J. had before been a discounteer of bills, but not a purchaser of them. He knew at the time that G. was in embarrassed circumstances; but believed that G. possessed assets. He knew too that certain persons could give him full information as to G.'s affairs, but he made no inquiries from them. He declined to discount these bills, but purchased them. G. became bankrupt. J. proposed to prove against G.'s estate for the full amount of the bills. The trustee in bankruptcy gave him notice that "at the date of the bankruptcy of G. you were not the holder of the bills of exchange in the affidavit mentioned, or any of them, for value, and could not then have maintained an action against G. thereon, if he had not become bankrupt." In the County Court, in Bankruptcy, this objection of the trustee was adopted, and the proof of J. upon the bills was restricted to the £200. The Chief Judge in Bankruptcy reversed this decision and ordered a proof to be allowed for the full amount of the bills. The Court of Appeal reversed this order, and restricted the proof to the amount paid for the purchase of the bills. On appeal to this House:

Held, first, that the form of the notice was sufficient under the Bankruptcy Orders of 1870. Secondly, that the order of the Chief Judge in Bankruptcy must be discharged, for that, under the circumstances proved in the case, J. must be taken to have had notice that the bills were fraudulent.

Per LORD O'HAGAN: *Quære*, whether the argument that the notice of objection to the title of a holder of bills was too vague and general in its terms, could be brought forward in this House on appeal, where no such point had been taken in the court below.

Per LORD BLACKBURN: Though since the repeal of the usury laws, the fact of taking a bill at considerable undervalue is not, of itself, sufficient to affect the title of the holder, it is an important element in considering whether the man who gave the undervalue was acting *bona fide*, in ignorance and error, or was assisting in committing a fraud, and avoided making inquiries because they might be injurious to him.

THIS was an appeal against a decision of the Court of Appeal reversing a decision of the Chief Judge in Bankruptcy.

The respondent was the trustee of the estate of two bankrupts, *named John Gomersall and James France [617 Gomersall, who formerly carried on business at Dewsbury, in Yorkshire: the appellant was a person who, for a sum of

(¹) Affirming 1 Ch. D., 187.

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£200, had purchased certain bills of exchange accepted by the Gomersalls, and who claimed to prove against their estate, not the sum of £200 the actual amount of his purchase-money, but the sum of £1,727 2s., being the nominal amount of those bills. The facts were these :

For several years before 1874 the Gomersalls had employed one Searby as their commission agent in London. In the end of 1870 they began to draw bills on him, always, at first, furnishing him with the means of meeting those bills ; but in 1874 they drew bills on him, or he became the drawer and they the acceptors, and a system of what is commonly called the making of "accommodation bills" was established between them. The character of the transactions appeared from the various letters which passed between the parties. Some are subjoined. The Gomersalls in January, 1874, wrote to Searby, "Enclosed we hand you bill duly accepted. Try Lovering, but before doing so get to know where he would discount it, and who he banks with, as you know it would not do for our bank or yours to know it, and so be careful in this point and oblige," &c. Other letters of a similar kind were written, and on August 20th, 1874, they wrote :

"What we want you to do is to draw on us for same amounts we have drawn upon you, and if the bank is queer to put them into a third parties, to hand to some business friends of yours, say John Lovering, or some such man, one that you and us could have confidence in, but do not mention it to a single person breathing, as we are not afraid but what the bank will come to. We do this suppose they do not and to make you safe. If they should write you take no notice but leave it to us. Withdraw all moneys from your bank perchance they might take extreme measures and put an attachment on your banking account. See to this early in the morning."

In another letter giving Searby caution as to his proceedings, and as to the bankers, the Gomersalls said, "File your petition, Monday, without delay. We shall file ours on Tuesday or Wednesday if they do not retract the summons already sent." There were other letters of a similar character.

618] *Searby drew fourteen bills on the Gomersalls, which were the bills now under discussion. The bills were accepted by the Gomersalls, and returned to Searby, who thereon tried to get them discounted, but failed. There were fourteen of these bills in all, and Lovering (the person specially mentioned in the Gomersalls' letters as "a friend" of Searby)

offered some of them to a person named Bennett for discount or for sale. Ten of them were purchased by Bennett for a sum of £250, and the remaining bills (amounting to £1,757. 2s.) were purchased by Jones for £200. These transactions took place at the end of August, 1874. On the 5th of October, 1874, the Gomersalls filed their petition for liquidation; they were adjudged bankrupts on the 8th of October; proof of the bills was tendered, and Jones claimed to prove for £1,727 2s., the nominal amount of the bills he had purchased. Mr. Gordon, who had been appointed trustee under the liquidation, sent to Jones a notice of objections to his claim, which claim he, Gordon, rejected. The second of these objections was in these terms: "That at the date of the bankruptcy of the Gomersalls you were not the holder of the bills of exchange in the affidavit mentioned, or any of them, for value, and could not then have maintained an action against them thereon, if they had not become bankrupts." The County Court judge adopted the objection, and ordered the proof against the estate to be limited to £200, but his decision was overruled by the Chief Judge in Bankruptcy, who ordered that the proof for the nominal amount of the bills should be received and be admitted to dividend. This decision was, in its turn, overruled by the unanimous decision of the Court of Appeal, and the proof was ordered to be limited to the sum of £200 (¹). This appeal was then brought.

Mr. *A. G. Marten*, Q.C., and Mr. *Cooper Willis*, for the appellant, insisted, first, that the form of notice given by the trustee in bankruptcy was insufficient under the general Bankruptcy Rules of 1870 for want of clearly specifying the nature of the objection; next, they contended that there was nothing here which could be pretended to be a preference of a particular creditor. The bills were sold, as goods might have been sold, *to raise money for the [619 Gomersalls. Such a sale of goods would have been valid, and so was this sale of bills. Jones knew nothing of any fraud, and such a knowledge could not be presupposed against him. As against the holder of bills of exchange, no mere presumptions were admissible. The negotiability of bills of exchange could not be affected in that way. There was nothing here which subjected the holder of these bills to a charge of taking part in fraud; yet, without being liable to that charge, he was entitled to recover the full amount of the bills. On the face of them, the bills were perfectly regular. Every one knew that in the ordinary

(¹) *Nom. In re Gomersall*, 1 Ch. D., 187.

way of commercial transactions, bills of certain firms become liable to doubts and suspicions. That made the dealing with them a matter of risk. The person who, under such circumstances, was willing to incur the risk, and advance real money upon bills of that sort, might be accused of rashness but could not be accused of fraud, and without the imputation of fraud he was entitled to recover the amount of the bills on which he had advanced his money. For the advantage of commerce, bills of exchange were negotiable instruments which passed freely, and which, appearing on the face of them, as these did, to be valid, became on mere transfer, and certainly on indorsement, valid securities in the hands of the holders. Unless there was plain evidence establishing against the holders a charge of fraud or corruption, they were entitled to recover. There was nothing of the sort here. All that was required to be done in the delivery and transfer of bills of exchange had been done here, and the parties to the bills, and the estates of those parties, were liable upon them. [*Ex parte Bloxham* (1), *Byles on Bills* (2), *Castrique v. Buttigieg* (3), and *Denton v. Peters* (4), were referred to.]

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the respondent: The form of notice was amply sufficient. There was no need here to discuss in any way the general doctrine of the negotiability of bills of exchange, but the circumstances showed that, while that general doctrine existed in [620] full force, a case was *established which left no doubt that the purchase of these particular bills had been effected with a full knowledge of the real facts, and with the purpose of gaining an advantage for the purchaser at the expense of the ordinary *bona fide* creditors of the Gomersalls. If the evidence supported that view of the case, there was no pretence for saying that such a transaction could stand. The undoubted facts showed such a case as to throw on the holder the *onus* of proving *bona fides* and value, and he had not proved value beyond a certain amount.

[*Marston v. Allen* (5), *Bailey v. Bidwell* (6), *May v. Chapman* (7), and *Hall v. Featherstone* (8), were cited.]

Mr. *Marten* replied.

LORD O'HAGAN: My Lords, you have had the advantage of an able and elaborate argument of the case, and the farther advantage of a report of the full discussion which it

(1) 6 Ves., 449.

(2) Ch. xi, ed. 1874.

(3) 10 Moo. P. C., 94.

(4) Law Rep., 5 Q. B., 475.

(5) 8 Mee. & W., 494.

(6) 13 Mee. & W., 73. See *Parko, B.*, at p. 76.

(7) 16 Mee. & W. 355.

(8) 3 H. & N., 284.

underwent in the courts below; and I believe that your Lordships see no reason to doubt the perfect correctness of the judgment of the Court of Appeal. For my own part, I think it manifestly right; and I am glad that the authority of this House will sustain it, without hesitation or reserve, in the interest of the mercantile honor and security of the country.

The facts of the case are peculiar, though the principles applicable to them seem to me plain and well established. As was observed in the Court of Appeal, although frauds on the eve of a bankruptcy are common enough, they have usually been frauds on persons advancing money or selling goods to bankrupts; but here the fraud was not attempted on the persons so advancing or selling, but on the general body of creditors. It is, so far, novel, and all the more dangerous on that account; but I am satisfied that the settled law gives ample power to meet it: and we are bound to apply that law with vigor and efficiency, if we would discredit unconscientious speculation, and prevent the repetition of transactions which the only one of the judges in the courts below *who ruled in the appellant's [621 favor, has rightly pronounced "nefarious."

A preliminary point was raised grounded on the Bankruptcy Rules of 1870, alleging the insufficiency of the trustee's notice of objection, by reason of its too great generality. I have grave doubts whether such an objection ought now to be entertained, as it does not appear to have been taken in the Court of Appeal; and I think your Lordships would scarcely be disposed to permit a suitor who has allowed his opportunity of urging such a point to lapse, to raise it after judgment has been given against him, and his adversary has encountered expense and delay which would have been spared if it had been successfully urged in the first instance. But, even if the argument be admissible, I think there is nothing in it. The notice of objection to proof appears sufficient, under the Bankruptcy Rules of 1870. It indicates, clearly enough, the ground to be taken against the appellant's claim, and, having regard to the nature of the transaction and the known principles on which alone it could be impeached, your Lordships can have no doubt that he was well informed of the general case to be made against him. It was not necessary or possible to go into details. A notice is not a pleading; and the doctrine that, in the latter, fraud, to be availed of against its perpetrator, should be specifically stated, has no application to the former. The defence comes too late; but, at all events, it is untenable.

The real questions in the case are substantially two. The appellant claims against the estate of the bankrupts, of whom the respondent is trustee, the sum of £1,727 2s. in respect of four bills of exchange, drawn by a Mr. Searby, accepted by them, and purchased by the appellant from their agent for the sum of £200. Your Lordships are required to determine: First, whether the circumstances under which the bills were drawn and accepted tainted them with fraud? And, secondly, whether the appellant had such notice of that fraud as disentitles him to recover?

The bankrupts carried on business at Dewsbury under the name of Gomersall Brothers; and Searby was a commission agent in London, selling goods for them. They were in the habit of drawing bills upon each other to a large extent, bills without any consideration. It is perfectly plain, upon 622] the correspondence, that these *bills were drawn—in the words of one of the Lords Justices—“for the fraudulent purpose of raising money so as to cheat the creditors of both drawer and acceptor.” Or, as another learned judge expressed it, “the bills were mere shams and fictitious things.” The parties to them were in a condition of utter insolvency; and both were contemplating bankruptcy whilst they strove to palm their worthless paper on the commercial public.

The evidence of this is conclusively furnished by the letters in proof. I do not trouble your Lordships by reading them again as you have heard them repeatedly, but I shall call your attention to one or two passages which put beyond controversy the relations of these correspondents and the motives of their action. The bankrupts wrote to Searby on the 20th of August. [His Lordship read a number of passages from the letters such as have already been set out, and proceeded:] Comment on such a correspondence would be idle. It establishes the whole case of the respondent on the first branch of it—the insolvency of the parties; the total want of consideration for the bills; the imminence of bankruptcy; and the intention to defraud. As between the juggling concoctors of the bills it is quite plain that they were nullities, and that no claim could have been established by the one against the other.

But then arises the second question—How far is the appellant affected by the fraud? He alleges that he purchased the bills for the sum of £200; and, although that sum was not one-eighth of the apparent value, if the purchase was made *bona fide*, without notice of the fraud or knowledge of it, or means of knowledge, or duty to institute inquiry reasonably suggested by the circumstances of the case,

which would have afforded such knowledge, he would be entitled to sue the acceptor or the drawer, or to claim his dividend on the bankrupt's estate for the entire amount.

On the facts admitted by himself, I submit that your Lordships cannot hold him so entitled.

This is his own sworn statement of the mode in which he became possessor of the bills:—

“These bills on which I have proved were brought to me by Mr. Lovering. He brought them all together. He offered me no other. I had discounted bills brought to me by him before. I *occasionally discount bills. These were left [623 with me for a day or two that I might make inquiries about them. I did so. I never saw Searby to my knowledge to that time. I did not want him, and I did not ask Mr. Lovering about him. I could have found him if I desired it. I did not know of Mr. Bennett having any bills. I had no communication with him about these bills. I inquired of one or two clerks I knew in the city about the credit of Messrs. Gomersall. I thought it a very risky thing from the information I received. I did not inquire of any one as to the consideration for the bills, or any of them. I did not ask Lovering anything about the consideration. I am not aware if he had any interest in them. I afterwards advanced £200 for them. I refused to discount them. I never bought any other bills before from any one. I made no inquiry as to the consideration. I generally buy as cheap as I can. I presumed the bills were *bona fide*. I have received no dividend from Searby's estate. Lovering gave me no reason for his having the bills. I think I offered to buy them. I declined to discount them. This was the latter end of August. The check I gave is dated the 31st August.”

It is to be noted that the bills so sold bore false dates, and that the sale so made was in the month of August, after the letters, to which I have called your Lordships' attention had indicated the purpose of bankruptcy by the drawer and acceptor, and the scheme by which they hoped to defeat the claims of creditors. But as we have no proof that Jones knew of the ante-dating or of the correspondence, I do not think that these things can be fairly pressed against him. What seems to me conclusive is his own statement of his own case. It puts, in my mind, beyond dispute, that he must have known the embarrassed circumstances of the acceptors and the drawer. His inquiries as to Messrs. Gomersall led him to the conclusion, he admits, that it was “a very risky thing” to deal for these acceptances; and, as to

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Searby, the transaction itself was perfectly demonstrative of his insolvent condition. This draft made him answerable for above £1,700, and it was purchased, with all his liability upon it, for £200. The bills, according to Mr. Lovering's account, had been hawked about and nobody would have them; and when the appellant took them, without inquiry or explanation, he must have been thoroughly assured of 624] the *incapacity of the parties to meet their engagements. In his affidavit, he says he was informed that the acceptors, although in difficulties, "were possessed of assets," and he speculated on the possibility of rendering those assets available to the detriment of *bona fide* creditors. But that very allegation tends to make it plain that he purchased, having no expectation of recovering against Searby, and he had none, because the circumstances satisfied him, as they must have satisfied any reasonable being, that Searby would not be able to discharge his liabilities.

Assuming, then, that the appellant had knowledge of the insolvency of the acceptors and the drawer, what was the nature of the transaction of sale? For a sum of £200, a claim to £1,727 is sold, and no sort of reason is sought or given for a proceeding so abnormal and extraordinary. Could any man of intelligence,—any commercial man,—any man conversant with bill transactions,—and such the appellant was,—have failed to believe that the offer of such terms was clouded with suspicion and suggestive of fraud? Could any honest trader, disposed to realize advantage only from just and open dealing, have failed to inquire as to the motives which suggested such a strange proposal, and to seek some explanation that might reconcile it with fair play to all concerned?

The appellant's hope, avowedly, was to clutch a portion of the assets of the bankrupts, through the transfer of securities of a most questionable kind; and it is unjust to him to suppose that he shrank from investigation, because he apprehended that it might lead to discovery which would baulk him of his object, and make his claim, as a purchaser with notice of the fraud, inadmissible in a court of justice?

At all events, he deliberately abstained from all inquiry. He had the fullest opportunity of making it. Lovering, he says, "gave no reason for having the bills:" and Lovering never was interrogated about them. Searby was within his reach—"I could have found him," he says, "if I desired it." But he desired nothing of the kind. He did not wish to ask,—how it came to pass that Searby sold his large liability for a sum so small? He did not desire to put a question as

to the consideration for the bills; or why, or where they had been concocted, or what would be the *effect of [625 the transfer of them on the creditors of the conspiring insolvents? Any question of the sort he felt might get an inconvenient answer; and having the fullest means of knowledge, he wilfully refused to obtain it. Of the reason of his refusal your Lordships cannot entertain a doubt.

Very properly, reliance was placed by the respondent's counsel on the inadequacy of the price offered for the bills, considered as valid and subsisting securities; and it was fairly urged that as, in the criminal law, the purchase of goods at a gross undervalue is pregnant evidence of guilty knowledge, so, in this case, the buyer of above £1,700 worth of securities for £200 must reasonably have such knowledge imputed to him. It was argued on the other side that as no more could be got for them in the market, the price was adequate, and that therefore such an inference should not be drawn. But this is a plain fallacy. If other people were wise enough and honest enough to avoid a fraudulent transaction, their abstinence can hardly avail the man who does not shrink from it, in spite of the flagrant *indicia* of impropriety.

My Lords, the law upon the subject is clear, and in full accordance with sound policy and common sense. It is thus stated in a work of very high authority: "A wilful and fraudulent absence of inquiry into the circumstances, when they are known to be such as to invite inquiry, will (if a jury think that the abstinence from inquiry arose from a suspicion or belief that inquiry would disclose a vice in the bills) amount to general or implied notice" ⁽¹⁾. And Lord Wensleydale has said: "Notice and knowledge mean not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes" ⁽²⁾.

My Lords, I suggest that the case before your Lordships comes plainly within the operation of these principles. The circumstances, beyond all doubt, invited inquiry, and made it, to an honest man, unavoidable. The means of knowledge were in the appellant's power. He dealt personally with Lovering. He had Searby at his call. He never questioned the one or sent for the other. His conduct was wholly inexplicable save on the assumption of his suspicion or belief—which any person of ordinary *sense and experience must [626 have entertained—that inquiry would disclose a "vice in the bills." He was determined that notice of that vice should not be used to deprive him of his chance of a dividend, and

⁽¹⁾ Byles on Bills, 119, and cases there cited.

⁽²⁾ Lord Wensleydale, *May v. Chapman*, 16 M. & W., 361.

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tried to avoid it by "wilfully shutting his eyes," and evading all inquiry. My Lords, he has not succeeded. The legal principles to which I have adverted govern the case; and the notice which they enable your Lordships to fix upon him will deprive him of profit from the fraud.

Mere negligence might not disentitle him to recover. Mere inadequacy of consideration might not, in certain circumstances, bar his claim. In spite of both, he might have proved the integrity of his motives and the purity of his conduct. But, without disregard to undisputed facts (which seem to me to make it palpable that his ignorance was wilful, if it was not, as I believe it was, only simulated), this transaction cannot be allowed to stand. If it could, the creditors of an insolvent would never be sure that he might not, by a trick at the moment when his circumstances had become most desperate, and when he was actually preparing to go into bankruptcy, transfer the right to prove on his estate to a person with whom he had had no real dealings, and who had no real claim upon him, so as to make the dividend of legitimate creditors inadequate or wholly worthless. Lord Justice Mellish calls this "a new fraud;" and the invention of it too characteristic of a period which has been dishonorably marked by affairs of the kind. With that eminent and lamented judge I think that we should be "very unworthy descendants" of those who have heretofore administered our law, if we allowed it to prevail. If we needed to better the example of those who established the doctrines which guard the rights of creditors, I am sure your Lordships would not hesitate to give those principles a salutary extension. But this seems to me unnecessary. The existing law, strictly applied to the circumstances with which we have to deal, is abundantly sufficient to enable you to do plain justice by affirming the judgment of the Court of Appeal.

Whether the appellant should be allowed to prove for the £200 which he paid to Lovering, is not now a question for decision, as there is no cross-appeal. The Lords Justices ruled that he should be, and whatever may be my own impression of the matter, their *decision in that respect is unchallenged, and I shall say nothing of it.

On the whole, I advise your Lordships that the judgment should be affirmed and the appeal dismissed with costs.

LORD BLACKBURN: My Lords, I am entirely of the same opinion. I should be extremely sorry to say anything which should cast doubt upon the principle that a bill of exchange, or a negotiable instrument of that sort, is negotiable to the

fullest extent of its kind. The negotiation of these bills of exchange, in a mercantile country like this, is of very great value. I take it to be perfectly clear that when a bill of exchange is (as these bills of exchange are) on the face of it a good bill, and there is nothing on the face of it to show the contrary, it *prima facie* imports value, *prima facie* a bill of exchange is a good bill of exchange, and it is necessary to show the contrary. I take it that even if the contrary is shown, if it can be shown that a bill of exchange in its inception was not a good bill of exchange, and that originally it was obtained by fraud, yet a person who has taken it *bona fide* and for value is entitled to sue upon it if the parties are solvent, and is entitled in a case of bankruptcy to prove upon it, even though it is shown that there was an infirmity or vice in the title of some of those persons who passed it, unless the knowledge of that vice is brought home to him who took it.

But, then, I think it is clear both upon the authorities, and also, as it seems to me, upon good sense, that when it is shown that a bill of exchange was a fraudulent one, or an illegal one, or a stolen one, in any one of those cases it being known that the person who holds it was a party to that fraud, to that illegality, or to that theft, and therefore could not sue upon it himself, the presumption is so strong that he would part with it to somebody who could sue for him that that shifts the burden. Then, instead of the bill of exchange being *prima facie* good, as it otherwise would be, so that the person holding it is entitled to recover upon it without proof of more, that shifts the burden. That has been decided over and over again. The consequence is, that the man who sues has in that case the *onus* upon him to prove that he *gave value. I should be unwilling to [628 say precisely whether it shifts the *onus* upon him to show that he gave value *bona fide*, so that, although he gave value he must give some affirmative evidence to show that he was doing it honestly, or whether the *onus* of proving that he is dishonest, or that he had notice of things that were dishonest, remains on the other side, although he is bound to prove value. The language of the quotation from Mr. Baron Parke would seem to show that the *onus* as to both is shifted; but I do not think that has ever been decided, nor do I think it is necessary to decide it in the present case. I have no doubt that in proving value, it may be proved that he himself took the bill under such circumstances, that although he gave value he could not sue upon it.

Farther, my Lords, I think it is right to say that I con-

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sider it to be fully and thoroughly established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange. I take it that in order to make such a defence, whether in the case of a party who is solvent and *sui juris*, or when it is sought to be proved against the estate of a bankrupt, it is necessary to show that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth he would have found, not that the man had stolen it, but that he had obtained it by false pretences, I think that would not make any difference if he knew that there was something wrong about it and took it. If he takes it in that way he takes it at his peril.

But then I think that such evidence of carelessness or blindness as I have referred to may with other evidence be good evidence upon the question which, I take it, is the [629] real one, whether he did *know that there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty. I think, my Lords, that that is established, not only by good sense and reason, but by the authority of the cases themselves.

Now, my Lords, I pass from the general question to the

particular case before us. These bills of exchange would seem to be good bills of exchange; there is nothing wrong upon the face of them, but although they purport to be drawn as good bills would be drawn, yet the external evidence proves beyond all doubt (I will not trouble your Lordships by repeating the letters which have been read) that at the time these bills were drawn, and at the time they were indorsed, Searby the drawer, and Gomersall the acceptor were both intending to become bankrupts, not simply that they were both insolvent and likely to become bankrupts, but that they had it actively in their minds that they were going to become bankrupts, and they both were aware and knew that if they could put these bills of exchange in issue, and get them circulated into the hands of an honest holder (of course they would have preferred that it should be an honest holder rather than a dishonest one), that man would come, not upon them personally, but upon the estate after they were bankrupts, and take away from their creditors as many shillings in the pound of the assets as the dividend would amount to upon the nominal amount of those bills, and not upon the sum actually advanced on them.

There was an elaborate discussion of the matter by the late Lord Justice Mellish, for whom no one can have a greater respect than I have, to prove that such being the transaction it could not possibly stand in a court of bankruptcy; to show that such a bill *could have been [630 proved neither by Searby nor by any one to whom, in contemplation of bankruptcy (for I consider that a material element), it was issued in order that he might, advancing a small sum upon it, get from the dividends in the Court of Bankruptcy the full nominal amount of the bills. There was an elaborate argument to show that that would have been a fraud upon the bankruptcy laws, and that the bills could not have been allowed to be proved, either in the hands of Searby or of any one who took them with notice that there was something wrong about the bills, the notice being in the manner and to the extent I have already mentioned. No one who took with notice could sue; that must be the result. It did not require, I think, so much elaborate argument to show that, but I have not the slightest hesitation in advising the House to affirm in that particular the judgment of the court below.

Then, my Lords, comes the important question, is there enough here to show that Jones, who gave £200 upon these

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bills, the nominal amount of which was £1,727, had notice to the extent to which, as I have mentioned, notice must be proved that there was something wrong about the bills; that they could not have been proved against the estate of Gomersall by Searby, the holder, and that they were brought to him to get a small sum for them, because they could not have been issued without? Was there enough to lead Jones to a suspicion of that, and therefore to call upon him to make inquiries, or if he did not make inquiries, was there enough to show that that must have been wilful on his part, and because he thought that if he did make inquiries the result would be unfavorable? I think it is necessary to go as far as that, and I think the evidence amply goes as far as that in this case.

Mr. Jones gives two accounts of his purchase of the bills. One of them is in his second affidavit, where he says that the bills "were brought to me," "and offered to me for discount, and from inquiries I then made I received information that the acceptors would be unable to pay the said bills in full as they were in difficulties, but that they were possessed of assets, and that there was a fair prospect of my being able to obtain payment of parts of the amount made payable by the said bills. The bills were left in my hands for a few days, and on the 31st of August last I agreed to purchase the same for the sum of £200." I read that, my 631] Lords, *because it seems to me that Mr. Jones there states, without disguise, the important and material fact that he was aware that Gomersall & Co.'s bankruptcy was in contemplation, that he was aware that they had assets, that he was aware that he would get his share of the dividends upon the full amount of the bills of exchange, namely, £1,750, and that he thought that would be enough to repay him the £200, and certainly, therefore, that he was quite aware of that material and cardinal fact that the bills were issued and discounted in contemplation of bankruptcy. When he is examined *viva voce* he says: "The bills were brought to me, the bills were left with me for a day or two that I might make inquiries about them. I did so. I never saw Searby to my knowledge at that time. I did not want him, and I did not ask Mr. Lovering about him. I could have found him if I desired it." Then he goes on after a little while and says: "I made no inquiries of any one as to the consideration for the bills, or any of them. I did not ask Lovering anything about the consideration. I am not aware if he had any interest in them. I afterwards ad-

vanced £200 for them. I refused to discount them. I never bought any other bills before from any one. I made no inquiry as to the consideration. I generally buy as cheap as I can. I presumed the bills were *bona fide*. I have received no dividend from Searby's estate. Lovering gave me no reason for his having the bills."

Now, my Lords, in an ordinary case a man is entitled to presume a bill to be *bona fide*, but I think it becomes a question whether, under the circumstances which this statement discloses, Jones had a right to presume that the bills were *bona fide*, and whether he did not really know that if he inquired into them, or spoke to Searby, or inquired of anybody else about Searby, he would have been confirmed in what he himself suspected, that the bills were not *bona fide*. Consequently, although if Searby had got an honest, ignorant, innocent man without knowledge to give value for them that man would have been able to prove, yet he, Jones, would be then fixed with clear knowledge which would prevent him from being a person entitled to recover, and therefore he abstains from making inquiries.

I think, my Lords, that since the repeal of the Usury Laws we *can never inquire into the question as to how [632 much was given for a bill, and if Searby was in such a position that he could have proved against the estate it would have been no objection at all that he conveyed these bills to another for a nominal amount, that he sold bills nominally amounting to £1,727 for £200. Although I think that could not have been inquired into, yet the amount given in comparison with the apparent value is an important piece of evidence guiding us to a conclusion as to whether or not it was a *bona fide* transaction. I am sure of this, that in criminal cases the general evidence that is given to show that the receiver of goods which were stolen knew that they were stolen is that he has given a great undervalue for them. That is not by any means conclusive, because it may very well be that he has given the undervalue under circumstances which do not suffice to prove that he had a felonious intention, or a felonious knowledge, which would be required to make him guilty. In like manner, I think if it is shown that a considerable undervalue was given for bills, although that alone would probably not be sufficient, it is an element, and an important element, in considering whether the man who gave that undervalue was *bona fide* doing it because he was in honest blundering and stupidity taking the thing without knowing that he was committing or as-

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sisting in fraud, or because he had a suspicion that he would deprive himself of a good bargain if he made too much inquiry and so had it brought home to him that there was fraud.

My Lords, with regard to this I do not know that I can do better than refer to what the late Lord Justice Mellish says about these particular circumstances⁽¹⁾. He says that Mr. Jones "manifestly knew that both parties" (the drawer and the acceptor) "were hopelessly insolvent, probably that the drawer could pay nothing at all; but that the acceptors, although likely to become bankrupts, had assets sufficient to pay a dividend." I have always pointed out, and I wish to repeat it, that in my mind the fact that these bills were issued for discount in contemplation of bankruptcy, and that the discounter knew that it was in contemplation of bankruptcy, is of extreme importance. Then he goes on: "What right had he to suppose that an utterly insolvent 633] *drawer" (that is Searby), "a man who would do such a thing as sell bills for £200, and in a short time afterwards have a claim against him for £1,700—would have kept these bills in his possession for two or three months after they were drawn, never receiving any money at all upon them, if he had had a good claim as against the acceptor?" "It appears to me," says the late Lord Justice, "that if Jones had not absolutely shut his eyes, there was sufficient for him to come to the conclusion, looking to the state of both these parties, that these bills were drawn for the purpose of enabling them recklessly to raise money on the eve of bankruptcy." I am entirely of the same opinion, and I think that, taking the whole of the circumstances together, particularly the fact that he knew they were issued in contemplation of bankruptcy, the fact that he calculated the price upon what he supposed would be the amount of dividend that he should receive upon the whole amount of the £1,727, and that, apparently (though the evidence is slight upon that point), the amount of that dividend would have been about three times what he paid; taking all these things together, and seeing how very improbable it was that the bills should be discounted in the way that they were, honestly, by a person who had a right to prove against the estate, taking all these things together, I come to exactly the same conclusion that was arrived at by the Court of Appeal below, that the circumstances were such as to produce the conviction that his refraining from making farther

(¹) 1 Ch. Div., at p. 145.

inquiry, not necessarily of Searby, but of anybody about Searby, can be attributed to nothing else than a suspicion in his mind that something was wrong about the bills, and that if he inquired farther he would be fixed with clear and conclusive notice and knowledge that the bills were wrong, and that, therefore, he could not get a dividend upon them. Now it is proved in fact that the bills were wrong, so that if he had notice he could not get a dividend. Under these circumstances I think that the decision of the court below was quite right, and I consequently agree in the judgment proposed.

I have only farther to add a word or two on the point that the notice of objection to the proof, given by the trustee, was not sufficient. I think, no doubt, there must be such a notice as calls the *attention of the parties to the fact [634 to be proved, so that they may be prepared to meet it, but I think that this notice was amply sufficient to show to everybody who read it that the point to be disputed was this, was Mr. Jones, who took these bills, a *bona fide* holder for value in such a manner that he could have sued upon them if the parties had been solvent, or could prove upon them in case of bankruptcy? And the course of the evidence shows that they so understood it, and that the parties brought their proof accordingly.

LORD GORDON: My Lords, I quite concur in the views which have been expressed by your Lordships, and I think it very satisfactory indeed that we feel not the slightest difficulty in affirming the judgment of the Lords Justices. I think it would be a very serious thing for the commercial world if there should be any toleration of such practices as appear to have been adopted by the parties who are interested in this case.

When I looked into the case I thought the judgment appeared to be right, and the only difficulty which suggested itself arose from the fact that the learned judge in Bankruptcy entertained a different view. But I see that the way in which he treats the subject is this: "If Mr. Jones could sustain an action, as no doubt he could, against the drawer and acceptor of these bills, he being the *bona fide* holder for valuable consideration, then he can prove upon them." Now this is an assumption which I venture to think he was scarcely justified in making. Looking to all the circumstances, I doubt very much whether Jones could have maintained any action on the bills. Yet the whole scheme of the first judgment is based upon that hypothesis. I also doubt

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very much whether, even if he could raise an action, he could prove against the estate. I think that the state of bankruptcy introduces some new elements into the consideration of such questions as these, and opens the door for an investigation into the conduct of the bankrupt and those who were conjunct and confident, as we express it in Scotland, with the bankrupt. Behaving, as they have behaved, and attempting, as they have attempted, to benefit by his bankruptcy, I do not think they could have been allowed the advantage they sought. Probably your Lordships 635] would *consider more carefully any suggestions of fraud on the part of those who were conscient and confidant with the bankrupt than you would consider similar suggestions with regard to third parties, or any one.

Now, in the present case, the transactions between the Gomersalls and Searby really are positively disgraceful. I am not using, I think, too strong an expression when the learned Chief Judge in Bankruptcy himself says: "I do not wonder at the impression made upon the learned judge's mind" (that is, the County Court judge), "when the details of all these nefarious transactions came out before him." In a case which produces the impression which this case did produce even upon the learned Chief Judge, that the transactions were nefarious, one feels anxious that courts should not allow themselves to be run away with from the true strict law applicable to the case. I have very carefully watched this case during the argument of Mr. Marten, and have gone along with a great deal of what he said as to the impolicy of doing anything which would injure the negotiability of bills of exchange, which form so valuable an element in the credit of this country. But steadily keeping that in view, I venture to think that, looking at the facts of this case, we not only have here a case as between the Gomersalls and Searby of gross fraud, but that any one who had notice of the real facts ought to have made minute inquiries into all the circumstances under which he took the bills. If the appellant took the bills from Searby, who was open to objection, and he had notice of the objection, it would apply to him. If he wilfully abstained from making himself cognizant of the facts, it may properly be said that if a man wilfully shuts his eyes, so as to avoid inquiring into the circumstances connected with such a history as this, the only impression which can be produced upon any unbiassed mind is, that he did so because he was afraid that if he inquired into the circumstances he would ascertain what would be

equivalent to notice, destructive of any claim he might afterwards make.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 26th June, 1877.

Solicitors for the appellant: *Rooks, Kenrick & Co.*

Solicitors for the respondent: *Williamson, Hill & Co.*

[2 Appeal Cases, 636.]

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[HOUSE OF LORDS.]

*PATRICK KEITH, and DAVID WYLLIE, Appellants; [636
and JOHN BURROWS, and WILLIAM PERKS, Respon-
dents (').

Freight—Mortgage of Ship—Bill of Lading.

A mortgagee of a ship does not, ordinarily speaking, obtain, by the mortgage alone, a transfer, by way of contract or assignment, of the right to freight. The mortgagor remains the *dominus* of the ship, with regard to everything relating to its employment, or non-employment, or to any rate of freight to be earned by its employment, until the mortgagee takes possession. The mortgagee on taking possession becomes the owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight, which, by contract or otherwise, is lawfully payable.

Goods which, by the terms of the bill of lading, have been carried upon a nominal amount of freight, can be lawfully demanded, by the holder of the bill of lading, on payment of that amount.

The owner of a ship cannot, by his subsequent acts, give to his mortgagees, as against the holder of a bill of lading, rights different from those possessed by himself under it.

M. was the owner of sixty shares in a ship. B. (who acted as master) was the owner of the remaining four shares. As B. could not get, at San Francisco where he was, any employment for the ship, he determined to obtain a cargo of wheat and bring it to England "on ship's account." Not having money to purchase the wheat, he obtained the cargo on the credit of P. & Co. To them he gave bills of lading, describing the wheat as "shipped on owner's account," deliverable to the order of P. & Co. "at freight of 1s. per ton." Bills of exchange for the price of the wheat (afterwards duly accepted by M.) were also given to P. & Co. M., who carried on business in London, had obtained from K. & Co., merchants in London, advances of money, and, by way of security, had given them a mortgage of his shares in the ship. While the ship was on its voyage, M. arranged with B. & Co., also of London, to make him advances to take up the bills of exchange; the advances were made, and, for these advances, he agreed that B. & Co. should receive the bills of lading, and certain policies of insurance effected by him, and should sell the cargo for his account and their own. B. & Co. sold the cargo of wheat to third persons. The sale note described the wheat as "at the price of 43s. 6d. per quarter of 500 lbs. shipped . . . including freight and insurance, &c. . . . Vessel to discharge afloat. Payment, cash in London, within seven days," &c. The last sentence of the note was, "As cargo is coming on ship's account, freight is to be computed at 55s. per ton of 2240 lbs. and invoice to be rendered accordingly." The invoice, made out by M. contained these words "6179 qrs. @ 43s. 6d. per 500 lbs." "Freight [637 on tons 1379-7-1-3 @ 55s. per 2240 lbs." M. obtained from B. & Co. necessary advances, with which he took up the bills of exchange, which, with the bills of lading

(') Affirming, *post*, p. 437, and reversing 18 Eng. Rep., 272.

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attached, were then handed to him. Both sets of bills were delivered to B. & Co. with a memorandum indorsed on the bills of lading that they were "assigned to B. & Co.," and "the freight assigned is at the rate of 55s. per ton, and not the nominal amount of 1s. per ton." The bills of lading and invoice were sent to the purchasers of the wheat. When the vessel arrived K. & Co., as mortgagees of the ship, took possession of it. The purchasers of the wheat claimed delivery of it to them on payment of the freight stated in the bills of lading :

Held, that they were entitled to the delivery of it on payment of that freight, for that the bills of lading could not, under the circumstances of the case, be altered, and that the 55s. per ton, introduced into the bought note, formed part of the whole purchase-money, being a payment to be made on delivery of the cargo, and though called "freight" did not properly bear that character.

THIS was an appeal against an order of the Court of Appeal, which had reversed a previous judgment of the Common Pleas Division (¹).

The action was brought by Keith & Wyllie, to try the right to freight on a cargo of wheat brought from San Francisco to England in the *Stonehouse*, and the facts were turned into a special case for the opinion of the court.

The plaintiffs were merchants in London, trading as James Wyllie & Co. The defendants, Burrows & Perks, were corn factors and brokers, also carrying on business in London. John Morison was the owner of sixty out of sixty-four shares in the ship *Stonehouse*, the master, Mr. Bley, being the owner of the remaining four shares. On the 1st of December, 1874, Morison executed a mortgage of his sixty shares in favor of Keith & Co., to secure a sum of £7,500, which they had advanced to him, and for interest, and for any farther advances. The ship was then at San Francisco seeking employment. As commercial affairs there were then very much deranged, no freight could be obtained, and therefore rather than return in ballast Bley determined to obtain a cargo "on ship's account." Messrs. Parrott & Co. were merchants at San Francisco, and through them he obtained a cargo of wheat (described as consisting of 23,644 sacks), and the invoice stated the wheat to be shipped by 638] Parrott & Co., consigned to their *order (which gave them the control of the cargo till the price should be paid), by order of John Morison for account and risk of whom it might concern." Parrott & Co. drew bills of exchange on Morison at sixty days' sight, to cover the price of the wheat. The bill of lading made the wheat deliverable to Parrott & Co., or order, "freight payable on delivery at 1s. per ton of 2,240 lbs. of gross weight delivered." The freight then current at San Francisco was 55s. per ton, but the nominal amount was inserted as the wheat was shipped as Morison's wheat in Morison's own vessel. The ship sailed from that

(¹) 1 C. P. D., 722 (where the facts are fully detailed); 2 C. P. D., 163.

place on the 3d of December, 1874. The bills of exchange were accepted on the 21st of December, 1874, payable on the 22d of February, 1875, and with bill of lading were delivered to Parrott & Co. On the 1st of January, 1875, Morison effected two policies of insurance on freight, valued, the one at £4,000, and the other at £1,000. The sum required to meet the bills of exchange amounted to £10,364 19s. 4d. Morison wanted to obtain money for this purpose, and in January, 1875, arranged with Burrows & Co. for the necessary advance, to secure which they were to be at liberty to sell the cargo and receive the proceeds on Morison's account; the bill of lading and the policies to be deposited with Burrows & Co. as security. Before making the advance Burrows & Co. searched the register at the Custom-House, but did not find any notice of any incumbrance on the vessel, nor had they any notice that Morison's shares therein had been mortgaged to Keith & Co. On the 4th of January, Burrows & Co. advanced to Morison £3,000, and received from him the policy for £4,000. On the 2d of February, 1875, he executed in favor of Keith & Co. a second mortgage of his shares in the ship to secure £4,000 and farther advances.

On the 19th of February, Burrows & Co. on behalf of Morison and of themselves, sold the cargo to Messrs. Jump, of Liverpool. The bought note contained the following statements: "Bought of J. Morison, through Messrs. Burrows & Perks, for Henry Jump & Sons, Liverpool, a cargo of Californian wheat, fair average quality of the season's shipments when shipped; shipped per Stonehouse, first class, from San Francisco. Bill of lading dated about 2d December, 1874, say 23,644 bags containing 3,089,775 lbs., at the price of 43s. 6d. per quarter of 500 lbs. shipped; bags *weighed and paid for as wheat; including freight [639 and insurance, to any safe port in the United Kingdom, &c. . . . no charge for demurrage or bags. . . . Payment, cash, in London, within seven days . . . in exchange for bill of lading, and policies of insurance (free of war risk), effected with approved underwriters, but for whose solvency sellers are not responsible. Invoice quantity is to be final." Then followed some other terms as to money allowances, not necessary to be mentioned, and the bought note concluded thus: "As cargo is coming on ship's account, freight is to be computed at 55s. per ton of 2,240 lbs. and invoice to be rendered accordingly." The case stated that Burrows & Co. would have had a difficulty in disposing of the cargo without allowing amount equivalent to freight

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to remain unpaid till the vessel's arrival; and would not have obtained so large a price for it. Morison made out an invoice in accordance with the above bought note; it was in these terms: "Invoice of wheat per Stonehouse, at San Francisco, sold to Messrs. Henry Jump & Sons, Liverpool, as per contract of 19th February, 1875:

"23,644 sacks wheat at 43/6 per 500 lbs.	£13,440	10	5
Freight in tons 1379 : 7 : 1 : 3—55/ per 2240 lbs.	8,793	5	0
	<hr/>		
	£9,647	5	5
Brokerage, $\frac{1}{2}\%$	67	4	0
	<hr/>		
	£9,580	1	5
Interest from 26 Feb. to 19 April, 52 days at 5%	68	4	10
	<hr/>		
	£9,511	16	7"
	<hr/>		

On the 22d of February, Morison obtained from Burrows & Co. an advance of £9,000; which, with the previous sum, made up their advances to £12,000, and with these sums he paid the bills of exchange given for the purchase of the wheat, and on such payment received the bill of lading and the bills of exchange attached thereto, which, on the next day he handed to Burrows & Co., and indorsed the following memorandum on the bill of lading: "We assign our 640] interest in the within freight to Messrs. *Burrows & Perks, London, whose receipt, or that of their appointed agent, will be sufficient discharge. The freight assigned is at the rate of 55/ per ton, and not the nominal amount of 1s. per ton.

"J. Morison & Co.

24/2/75."

At the same time he wrote to Burrows & Co. the following note: "We farther give you in security policy of insurance on wheat £1,500, and on freights £1,000, both in the Stonehouse. Should this vessel be lost, we trust you will give us the collection on them as well as on the former policies.

J. Morison & Co."

The invoice was forwarded to Messrs. Jump, who paid the balance, £9,511 16s. 7d., and shortly afterwards sold their interest in the cargo to Ross & Co. of Liverpool.

On the 2d of March, Morison mortgaged his interest in the ship to Joseph Harrold, to secure a sum of £800 then advanced to him. Harrold registered his mortgage on the next day, the 3d of March, and thus stood in the position of first mortgagee. Keith & Co. did not register their mortgages till the 6th of March.

The ship arrived on the 13th of April at Falmouth, for

orders, and was taken possession of by Harrold and by Keith & Co., as mortgagees. Harrold's claim being fully covered by the ship he laid no claim to the freight. The ship arrived at Liverpool on the 19th of April. The market was then falling. The freight at 55s. per ton was claimed by Keith & Co., as the mortgagees of the ship. Burrows & Co. insisted that it belonged to them under the assignment made to them.

By an agreement between the respective parties, made in order to prevent delay and loss, the sum in dispute was paid into the London and Westminster Bank to abide the event of the action.

The Court of Common Pleas gave judgment for the plaintiffs⁽¹⁾; on appeal, that judgment was reversed⁽²⁾. This appeal was then brought.

Mr. C. S. C. Bowen (Mr. Herschell, Q.C., was with him), for the appellants, the mortgagees: The owner of a ship is entitled to freight from any person whose goods he has carried in his ship. The mortgagee of a ship *stands [64] precisely in the same situation as the owner, *Camden v. Anderson* ⁽³⁾, where Lord Kenyon said ⁽⁴⁾, "The right to freight results from the right of ownership." *Morrison v. Parsons* ⁽⁵⁾ proceeded on that principle. On that principle, too, the insurer, on becoming the abandonee of a vessel, is entitled to the same rights as the original owner, and can claim the freight, *Davidson v. Case* ⁽⁶⁾; freight being an incident to the ship: *Stewart v. The Greenock Marine Insurance Company* ⁽⁷⁾; *The Scottish Marine Insurance Company v. Turner* ⁽⁸⁾. The value of the goods is enhanced by the service of carrying them, and therefore the person who performs that service is always entitled to compensation: *Miller v. Woodfall*, per Lord Campbell ⁽⁹⁾. In that case there was no freight at all declared to be payable, the goods were from beginning to end the goods of the shipowner, and that case may, therefore, be taken as establishing the principle of liability to freight, or payment in the nature of freight, for service rendered. If the goods at the commencement of the voyage belong to the shipowner he will not, perhaps, in point of form insert in the bill of lading the amount of the freight, for he would not go through the ceremony of paying himself, though, if he conducts his business properly, he will, as Lord Colonsay observed in *Weguelin v.*

⁽¹⁾ 1 C. P. D., 722.

⁽²⁾ 2 C. P. D., 164.

⁽³⁾ 5 T. R., 709.

⁽⁴⁾ At p. 711.

⁽⁵⁾ 2 Taunt., 407.

⁽⁶⁾ 5 M. & S., 79; 2 Br. & Bl., 379; 5 B. Moo., 116.

⁽⁷⁾ 2 H. L. C., 159.

⁽⁸⁾ 1 Macq. Sc. App. Cas., 334.

⁽⁹⁾ 8 El. & Bl., 493, at pp. 504-505.

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Cellier ⁽¹⁾ enter the freight on one side to the credit of the vessel, and on the other debit the cargo with the freight. The mortgagee when he takes possession under his mortgage has a right to treat the ship as earning a substantial freight, and though the shipowner, while the goods were his own, charged no freight against them, they become liable to freight the moment he consigns them to third persons. *Gumm v. Tyrie* ⁽²⁾ abundantly confirms that proposition. [LORD PENZANCE: In all the cases where a contract for freight exists the only question is, who, under the various circumstances of those cases, is entitled to the freight.] There is a contract here. If none had existed while the wheat was the property of the shipowner, it arose when he parted with property in the wheat, and was declared in the bought note. [LORD BLACKBURN: The contract was in the bill of lading, and there the freight is stated at 1s. per ton.]

The case of *Brown v. North* ⁽³⁾ is not, when rightly considered, adverse to the appellants. No freight was payable there; but then the cargo continued all the time the property of the shipowner, and no change was made by him in its original character. Here a change was made, and made by him while he possessed full authority to make it. While the shipowner was still the owner both of ship and cargo, he assigned by a written paper, dated the 24th of February, 1875, the freight, as freight, to Burrows & Perks, declaring in the written paper, "The freight assigned is at the rate of 55/ per ton, and not the nominal amount of 1/ per ton." And in the same manner the bought note itself made by Burrows & Perks on the sale by them of the wheat to Jump & Co. contained the words: "As cargo is coming on ship's account freight is to be computed at 55/ per ton." Burrows & Perks had therefore ample notice that the freight was to be at a real and not a nominal amount, and conducted their dealings on the sale of the cargo with that knowledge. They were now incapable of denying what they themselves had done.

Mr. *R. E. Webster* (Mr. *Thesiger*, Q. C., was with him): It is not denied as a general proposition that the owner of a ship is entitled to freight for goods carried in his ship, and that a mortgagee taking possession before the goods are delivered stands in exactly the position of the owner, and like him is entitled to the freight. It is distinctly so stated

⁽¹⁾ Law Rep., 6 H. L., 286, at p. 301. 97; affirmed, 6 Best & S., 298; 34 L. J.

⁽²⁾ 4 Best & S., 680; 33 L. J. (Q.B.), (Q.B.), 124.

⁽³⁾ 8 Ex., 1.

by Lord Justice Wood in *Brown v. Tanner* ⁽¹⁾. But the circumstances here render that general doctrine entirely inapplicable. The owner has a right to carry his own goods in his own vessel without paying any freight, *Alexander v. Simms* ⁽²⁾; *The Mercantile Bank v. Gladstone* ⁽³⁾, or to state in the bill of lading a freight which is purely nominal, and the mortgagee, merely because he is mortgagee, cannot claim freight against the owner. If the owner so states it and then sells the cargo and hands over the bill of lading, he cannot afterwards *charge a new and different sum for [643 freight. He is bound by the statement of the freight in the bill of lading. Nor can his mortgagee in that respect stand in a different situation from himself, and, upon the general doctrine that freight is chargeable on goods carried, or on the pretence that the value of the goods has thereby been increased, alter the amount from that stated in the bill of lading whatever that amount may be. If he could do that a bill of lading would be a valueless instrument. *Brown v. North* ⁽⁴⁾ is a distinct authority to show that the terms, whatever they were, stated in the bill of lading must be observed. And there the bills of lading said—"no freight being owner's property," or "on owner's account." In *Gumm v. Tyrie* ⁽⁵⁾ there was an express stipulation for payment of freight, though no particular freight was named, and the mortgagee was held entitled to freight because the owners would have been entitled to it had there been no mortgage. So would the shipowner here, but the amount was settled; it was fixed at 1s. per ton. In *Miller v. Woodfall* ⁽⁶⁾ the claim for freight, as freight, was expressly negatived, but a compensation was allowed for the service performed by the insurers in bringing the goods from Southport to Liverpool, and, for convenience sake, that compensation was calculated at the rate which would have been payable as freight for carrying the goods such a distance. But that was a kind of *quantum meruit* and did not affect any rights previously existing. The sale of the cargo here was effected on terms—what terms?—those to be found in the bill of lading, namely, a freight of 1s. per ton. As Lord Justice Mellish said ⁽⁷⁾: "I am clear that the mortgagees have no right to what they contend is 'accruing freight' unless they can find, in existence at the time when they take possession, a contract by which freight was to be paid to the mortgagor." The

⁽¹⁾ Law Rep., 3 Ch., 597, at p. 602.

⁽²⁾ 5 D. M. & G., 57.

⁽³⁾ Law Rep., 3 Ex., 233.

⁽⁴⁾ 8 Ex., 1.

⁽⁵⁾ 4 Best & S., 680; 33 L. J. (Q.B.),

97; affirmed, 6 Best & S., 298; 34 L. J. (Q.B.), 124.

⁽⁶⁾ 8 El. & Bl., 493.

⁽⁷⁾ 2 C. P. D., at p. 166.

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only contract here was that which declared the freight to be 1s. per ton. And the court below rightly held that the words introduced into the assignment of the freight and into the bought note did not alter the bill of lading and create a new freight, but only related to the form and the periods 644] *in which the two sets of payments by the purchasers for the cargo and for the delivery of it, were to be made.

Mr. *Bowen* replied: No authority had gone farther than this; that the holder of a bill of lading had a right to receive the goods, but only on the payment of freight. Here he refused to pay freight because the owner of the ship had originally shipped the goods on his own account, and consequently no freight was payable from him to himself. But here the holder of the bill of lading was a third person, who had purchased the goods under a bought note afterwards made, and made while the owner had full authority to make it, and which stated a substantial and not a nominal freight, and so the purchaser became liable to pay the substantial freight. Having made the agreement, he could not now deny it. At all events he was bound to pay to the mortgagee that portion of the freight which accrued due in respect of the carriage of the goods after the mortgagee had taken possession.

THE LORD CHANCELLOR (Lord Cairns): My Lords, in this case your Lordships have heard from the learned counsel for the appellants, Mr. Bowen, an extremely able and ingenious argument, and certainly everything has been said by him which could be said in support of the propositions for which the appellants contend. But notwithstanding, I do not think that, now that this case is properly understood, there is any doubt in any of your Lordships' minds as to what decision should be arrived at.

I should say at the outset that there is an apparent conflict, but it seems to me to be nothing more than an apparent conflict, in the decisions of the courts below. It is quite true that the Common Pleas Division decided in favor of the appellants, and that decision was reversed by the unanimous decision of the Court of Appeal. But as I read what took place in the Common Pleas Division the great stress of the arguments went upon, and the attention of the court was occupied with, not the question which has been argued now, 645] but another question which might arise in *the case with reference to the effect of the Ship Registry Acts. The particular question which has now been argued at your Lordships' bar was disposed of in the Court of Common Pleas in a very few sentences, and in a way which seems to

me to show—indeed I think that was admitted at the bar—that this point was not fully developed in argument before the Common Pleas Division.

Now, my Lords, the question arises with regard to the rights of the mortgagee of a ship taking possession, both generally and also under the circumstances of this particular case. My Lords, with regard to the general rights as between mortgagor and mortgagee of a ship there cannot, I think, at this time of day be any real controversy. The mortgagee of a ship does not, ordinarily speaking, or by a mortgage such as existed in the present case, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or indeed to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own or for his own benefit. Those goods which are brought home for him, he may sell at their full market price when they arrive in this country, thereby, of course, bringing into his own pocket not merely the original value of the goods, but also the portion of remuneration which represents the value of the carriage of those goods from abroad. Or, again, he may, in making through his master a contract for freight at a foreign port, attach to the carriage of the goods a rate of freight which may either be nominal or may be very far under the ordinary rate of freight of the market. All those acts would be the ordinary incidents of the ownership of the mortgagor, who remains the *dominus* of the ship with regard to everything connected with its employment, until the moment arrives when the mortgagee takes possession. If the mortgagee is dissatisfied with the amount of authority which the mortgagor possesses by law, it is for him to put an end to the opportunity of exercising that authority by taking the control of the ship out of the hands of the mortgagor.

My Lords, all these propositions are beyond dispute, and indeed were not denied in the argument at the bar. And, farther, it was *not denied that in the present case, [646 where, upon the shipment of the goods at San Francisco, there was inserted in the bills of lading a rate of freight of 1s. a ton, which was merely nominal, the owner, or the master on the part of the owner, had a right to insert that sum in the bills of lading; and moreover that if those bills of lading had been passed over to third parties, these third parties when the ship arrived in this country and was taken

possession of by the mortgagee, might have come with those bills of lading and, on payment, or tender, of a sum representing the nominal amount of freight, might have taken possession of, and would have been entitled to have delivered over to them, the goods in question. It was also not denied that, if nothing more had happened, and if the owner of this ship himself had come, the mortgagee having taken possession, and had asked for those goods to be delivered to him, paying the mortgagee in possession the nominal sum for the freight, he also would have been entitled to receive the goods.

My Lords, in point of fact when a mortgagee takes possession he becomes the master or owner of the ship, and his position is simply this: from that time everything which represents the earnings of the ship which had not been paid before, must be paid to the person who then is the owner, who is in possession. The owner then in possession happens to be the mortgagee, and it is in consequence of his filling that position, and not by virtue of any contract or any antecedent right, that he becomes the person entitled to receive the freight. But that right again is itself checked by another consideration. All that he can receive is that which the ship was in the course of earning, either by way of express contract, or, which is the same thing, by carrying goods upon a *quantum meruit*.

My Lords, I pass therefore from all those questions, which, as the argument developed itself, turned out not to be really disputed, and I come to that which was the only real controversy in the case. It is said on behalf of the appellants that, although originally the bills of lading were given for this nominal freight, and might properly be given for it, and if nothing more had been done, upon the payment of that freight the goods must have been delivered up, something more was done, and a different state of things arose [647] whilst the ship was on the voyage and when it was *on the point of arriving in this country. Now, my Lords, what happened was this. Bills of exchange had been drawn at San Francisco representing the value of the goods which had been put on board. Those bills of exchange had been sent over to this country with the bills of lading attached, and were maturing. In order to get possession of the bills of lading it became necessary for Mr. Morison, who was the owner of the ship, and in whose interest the goods had been put on board, to provide for the payment of the bills of exchange a sum of upwards of £10,000. He could not do that with his own money, and he made an arrangement

with the respondents that they were to provide the money, and that the goods were to be realized in the common interest both of Morison, the owner of the ship and the goods, and of the respondents, who were providing him with this money to take up these bills of exchange, together with some farther sum, making the advance altogether, I think, about £12,000.

My Lords, the sale of the goods was put into the hands of the respondents, and the goods were sold by them to persons of the name of Jump of Liverpool, and it is upon the wording of the documents which then passed, that the difficulty of the case, if it be a difficulty, has arisen, at all events that the ground for the argument of the appellants has arisen. Now I must say with regard to the documents that they are not, as it seems to me, very happily expressed; but when they are carefully looked at, I do not think there can be the least doubt as to what was intended by the parties. The documents are three in number, and although they are of different dates, running from the 19th to the 24th of February, it is quite clear—indeed the statements in the case go to that extent—that the three documents are all to be taken together; they form part of one and the same transaction, and it is impossible to estimate properly the exact character of the transaction unless the documents are looked at.

My Lords, I do not at all propose to read the first document at length, for it has been very recently read to your Lordships. It is, in the greater part of it, an ordinary contract of sale on the cost, freight, and insurance terms, and in the centre or early part of the contract we have the words “including freight.” But inasmuch *as the last [648 clause of the contract expands this word “freight,” and puts a meaning upon what is intended by the word “freight” in the centre, your Lordships must read the contract as if the glossary, the interpretation of the term “freight” given at the end, had been read into the centre of the contract. Now, the glossary or interpretation which is given of the term “freight” at the end of the contract explains very clearly what the parties meant when they used it in the centre of the contract. We must bear in mind that which, obviously, was made known at the time to the parties, as to what was in the bills of lading. The clause at the end is this, “As cargo is coming on ship’s account freight is to be computed at 55s. per ton. of 2,240 lbs., and invoice to be rendered accordingly.” That expression is not very correctly put, but it obviously means this; it amounts to a statement that the cargo was coming on the ship’s account,

and there is implied, what of course the parties knew by the bills of lading, that in the bills of lading the rate of freight was nominal merely, but that which is upon the bills of lading is corrected for the purpose of reckoning or computation, and there is virtually this statement; although in the bills of lading, although in the contract of the freight, you will find a nominal sum was set down as "freight," that was not what we meant when we used in the centre of this contract the words "including freight," but what we meant was a different and a larger sum, namely, 55s. a ton, that sum is to be entered for the purpose of computation as if it was freight, not because it is freight, for it is not freight, but for the purpose of computation, in order that there may be that deduction made from the whole price, and in order that the payment of that sum may not be made immediately, or within seven days, as the rest of the price is to be paid; and that (says the contract) is to be done in the invoice which is to be delivered.

Accordingly, when you proceed to the next step, and look at the invoice, you find that that is exactly what is done. The estimate or computation is made of the whole price at 43s. 6d. per quarter, that amounts to £13,440 10s. 5d. Then a deduction is made by way of computation of the freight on so many tons at 55s. per ton, that deduction amounts to £3,793 5s., and then there are the usual reckonings of brokerage and so on. The result is *that there is to be a payment made in cash on the 26th of February of £9,511 16s. 7d.

Then, my Lords, we have this statement with regard to the third document. "On the 23d of February, 1875, in pursuance of such last-mentioned arrangement" as part of the same transaction, Morison hands over; along with the bills of exchange, the three bills of lading, containing a nominal sum for freight to the defendants, and this memorandum is indorsed on the bills of lading and signed by Mr. Morison. "We assign our interest in the within freight" (that is, the freight as it stood in the bills of lading) "to Messrs. Burrows & Perks of London" (the respondents), "whose receipt or that of their appointed agent will be sufficient discharge. The freight assigned is at the rate of 55s. per ton, and not the nominal amount of 1s. per ton." Now was this meant and intended, because it was admitted that the argument of the appellants must go to this, was this intended to be a cancellation of the original contract of the freight at the rate of 1s. a ton and a substitution of a new contract for freight by which Mr. Morison, the ship-

owner, was engaging to carry the goods at a higher rate of freight, and the person who had sold the goods, or who was representing the owner of the goods, was content to admit an obligation to pay freight at the rate of 55s. a ton? My Lords, I cannot find that there is anything whatever in this document which indicates any intention of that kind. It appears to me simply to be a supplement, the necessary supplement, of the arrangement which had been made by the two other documents which I have mentioned.

It appears to me that the result of the whole was, as it was held by the court below to be, a division of one entire sum by way of purchase-money for these goods into two parts (as the case finds it was, the facile and easy way of arranging the matter) the one to be paid immediately, that is to say within seven days, the other to be computed as freight (but not really to be freight) and to be paid at the time at which freight would have been payable, but when paid to be paid really as part of the price of the goods. My Lords, there was not, as it seems to me, any intention in the minds of the parties to change, and there was not any act which amounted to a change of the contract for the freight between the *shipowner and any person who might [650 be entitled to the goods; and therefore when the mortgagee takes possession it appears to me that he can find nothing and claim nothing, under any of those documents, which can give him a title to a greater amount of freight than was originally mentioned in the bills of lading.

My Lords, upon these grounds I submit to your Lordships that the decision,—the unanimous decision,—of the Court of Appeal is correct, and that this appeal should be dismissed with costs.

LORD PENZANCE: My Lords, I must say that this case has been very ably argued indeed on both sides. When the case was first presented to your Lordships it appeared to me to be placed by the learned counsel for the appellants upon a very broad and simple ground, and it was rested upon an argument of a very interesting character, namely, upon this ground, that where goods are shipped on behalf of the owners of the ship and, either no freight is made payable by the bill of lading, or a merely nominal freight is made payable on that account, and where, before the vessel has discharged the cargo a mortgagee of the ship has taken possession of the ship, he is entitled to look, in the abstract, upon the earnings of the ship as his property, as something payable to him, and although there should be no real contract for the payment of anything in respect of these goods,

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they being the goods of the owner of the ship, yet that the fact of the ship having carried them and thereby—looking at the matter in the abstract—having increased the value of the goods, and having thus earned a something for carrying them,—is sufficient to create in the mortgagee a right to receive a sum proportionate to the benefit derived. There is no doubt that where goods are shipped on board of a vessel under those circumstances, they derive an additional value by being carried; and although no freight is reserved by the bill of lading, yet when the goods arrive, the ship-owner receives in the increased value of the goods something which to him represents precisely the same thing as if he had been carrying somebody else's goods, and he had paid him a definite sum for the carriage of them. There is no doubt that that is in the abstract a state of things in which the ship is earning something, but the question is [651] whether that *state of things alone has ever yet been held to give to a mortgagee a right to claim a freight.

Now, my Lords, upon that subject I think the authorities which have been produced are entirely against any such notion. Several authorities have been cited, which I will not trouble the House with at any length. There was the case of *Brown v. North* ⁽¹⁾, and there was the case of *Miller v. Woodfall* ⁽²⁾, which seem to me to have directly raised the sort of question that I am now asking your Lordships to consider. In *Miller v. Woodfall* goods had been shipped on the owner's account, the vessel had been abandoned, the property in the vessel had therefore passed to the abandonee, and the abandonee claimed to have the benefit of the earnings of the vessel, although no freight had been reserved by contract; but the language of Lord Campbell in giving judgment in that case, which was read to your Lordships, was distinctly antagonistic to any such claim upon principle. There was another case which illustrated the same matter. Neither of these cases it is true, is the case of a mortgagee, but I apprehend that the principle is precisely the same. The other case was the case of *The Mercantile Bank v. Gladstone* ⁽³⁾, in which the same question arose with regard to a vendee, and in like manner the claim to the earnings of the ship, as distinct from the earnings as regulated by a contract to pay something, was repudiated by the court. Under those circumstances I think that the argument on behalf of the appellants, so far as it is based upon any such general right as that to which I have alluded, must fail.

But then the learned counsel for the appellants, more

⁽¹⁾ 8 Ex., 1.

⁽²⁾ 8 El. & Bl., 493.

⁽³⁾ Law Rep., 3 Ex., 233.

particularly in reply, has fallen back upon that which no doubt is a point well worthy of your Lordships' consideration. He says: For the moment passing from my first ground, I will assume that the mortgagee is not entitled on taking possession of the vessel to any freight other than that which has been contracted to be paid, but (he says) the circumstances of this case show this state of things, that originally a very small sum, namely, 1s. per ton, was contracted to be paid, but that afterwards, and whilst the vessel was still on its voyage, the shipowner and the person who was entitled *to the goods, by a bargain made [652 between them, agreed to vary the original contract of 1s. a ton, and to create a fresh and a new contract for a much larger sum, namely, 55s. a ton. That is the way in which the learned counsel put it, and if the facts of the case supported it, it would seem to me that the law would be in his favor.

The only question, therefore, my Lords, is whether the facts of the case do support this contention; and really the whole matter, now that it is thoroughly understood, appears to me to turn on one of the three documents to which my noble and learned friend the Lord Chancellor has adverted. The document of the 19th of February is one of the three documents which represented the transaction. The defendants had agreed with Mr. Morison to make to him the necessary advances to enable him to take up the bills of exchange, and a part of the bargain was that they should be at liberty, in truth, in order to put themselves in funds, and to secure themselves, to sell the goods as a part of the arrangement on which they were to make these advances. Accordingly on the 19th of February (on their own account, to the extent of their advances, and on the account of Morison to the extent of the rest), they did sell. They sold the cargo to Messrs. Jump, and the bargain, down to the last paragraph of the written contract, was an ordinary bargain for the sale of a floating cargo, cost, freight, and insurance. It is not denied by the learned counsel for the appellants that, had it not been for the last paragraph of the written documents, what would have happened would have been this,—the purchasers would have been bound to pay the complete sum of 43s. 6d. a quarter, holding back in their hands sufficient to discharge the freight which the shipowner would naturally be entitled to demand of them when the cargo arrived. That would be the natural effect of a contract such as this apart from the concluding paragraph.

But at the end of the contract come these words: "As

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cargo is coming on ship's account freight is to be computed at 55s." "per ton of 2,240 lbs., and invoice to be rendered accordingly." Now, I think every one will agree that the obvious reason of that was this: A round sum was to be paid for the goods, that round sum would represent the 653] original value of the goods *plus* the value *that the goods would be worth on arrival at the port of discharge; in other words the original value of the goods *plus* the cost of carrying them. That was the nature of the bargain, and it is obvious enough that if the goods did not arrive, and if the purchaser were to pay the whole value of the goods so computed, he would be paying for the cost of carrying them, although in truth they had never been carried, and therefore it is quite natural that a sum should be kept back which would represent the cost of carriage, and for that purpose it was, as it seems to me, that this clause was introduced.

Well, my Lords, but Mr. Bowen says, Yes that may be very true, but the language which they have used shows that what was intended was, not merely that a sum should be kept back to represent the carriage of the goods, but that a new bargain should be made that the carriage of the goods should be paid for at that price. Whether he is right or not in that is just the question, and I think it all turns upon the language used. Now, the language used is not that the freight is to be altered from 1s. a ton to 55s., and the bill of lading amended accordingly. It would have been quite competent to them to do that, because Messrs. Jump were to be the purchasers of the goods and were to have the bills of lading, and Mr. Morison was the owner of the ship, and no doubt between them they might have arranged that the old freight of 1s. a ton should be withdrawn, and that a new freight of 55s. a ton should be paid, and they might have agreed to alter the bill of lading to that effect. Instead of that, all that they say is this: "The freight is to be computed at 55s." "per ton of 2,240 lbs., and invoice to be rendered accordingly." I think that language points much more naturally to this: As a matter of account, and in order to express and explain what it is that the purchaser is to be entitled to hold back, we will take the sum of 55s. a ton as representing the sum which he is to be entitled to hold back, which for that purpose we will call freight. It seems to me that that is the natural meaning of the document. That being so there was no alteration whatever of the bill of lading, or of the contract which the bill of lading contained. Therefore, my Lords,

the claim of the mortgagee falls to the ground, and I should advise your Lordships to reject this appeal with costs.

*LORD O'HAGAN: My Lords, I am of the same [654 opinion. Your Lordships may affirm the judgment of the Lords Justices without more than an almost formal conflict with the Court of Common Pleas, for I observe that the real ground of your decision was scarcely brought under the consideration of the learned judges of that court.

The course of the very able argument before your Lordships has varied much, but it has been brought, I think, to a narrow issue.

Although we had an ingenious controversy upon the point, it seems to me established beyond dispute, and almost too clearly for argument, that the shipowner may, for his own interest, and at his own discretion, procure a cargo for his ship's account, and make the voyage unfruitful of profit, in the way of freight, so as to take from a mortgagee any benefit by reason of such profit. Chief Justice Cockburn puts this succinctly in *Gumm v. Tyrie* ⁽¹⁾: "When goods are shipped on account of the owners of a vessel, no question about freight can arise; and a mortgagee, if he takes possession under the mortgage, cannot claim freight in respect of the cargo conveyed in the vessel on account of the owners." The proposition which was urged so strongly, that in such circumstances the mortgagee might claim on account of the work of the ship enhancing, by transit, the value of the cargo, is not sustainable. It is supported by no authority, and can, in no way, avail the appellants.

What was done, in this matter, the special case makes very clear. This is the statement of its fourth paragraph: "The Stonehouse was at San Francisco 'seeking employment, and the freight market being disorganized owing to a recent commercial failure, her captain, Mr. Bley, determined, rather than accept the low offers of freight which were being made in the thick of the crisis, to load a cargo of wheat on account of the ship, hoping by its sale in England to realize a better margin than what was available as freight at the port of loading." The cargo was shipped for the benefit of the owner, and without any view to the earning of freight. The captain had made efforts in that direction, *but he could get no desirable offer; and he [655 accepted the wheat as likely to produce a better profit from its sale in England. The amount of freight mentioned in the bill of lading was merely nominal, and inserted for reasons which have been fully explained. What, in such cir-

⁽¹⁾ 4 Best & S., 680, at p. 703; 33 L. J. (Q.B.), 97.

cumstances, was the position of the mortgagee? The cases make it clear that he had his claim, not only upon the vessel, but upon any benefits or advantages which were in process of accrual when his mortgage was executed. If there had been a contract for freight he would, properly, have claimed the profit of it. But there was none. There were no parties by whom such a contract could have been made; and though the bill of lading gave a right to the shilling which it specified, it gave no right to anything more. The captain had taken the cargo substantially freight free, and the mere fact that it was carried in the vessel, in the absence of any contract, did not create a farther liability. The bill of lading had fixed the relations of the parties, and the mortgagee was bound by its terms. The dealings of third persons did not give him rights which otherwise he could not have asserted. No freight, save the shilling, was accruing, or to accrue, when his interest in the ship was created. The matter is pointedly put by Lord Justice Bramwell: "Now suppose these bills had been dishonored, what freight would then have been payable? Suppose the defendants had not advanced the money to take them up, though the contract for sale had been made. The shippers' freight agent in that case would have been only held liable for one shilling; and why should the defendants be held liable for more?" The use of the word "freight" has originated this difficulty. But that word in its collocation did not create a contract of affreightment giving any new claims to the mortgagee. The "computation" for mercantile purposes was to be at 55s., but the contract remained a contract of sale.

The case has been already so fully dealt with by my noble and learned friends that I shall add nothing farther. I advise your Lordships to dismiss the appeal with costs.

LORD BLACKBURN: My Lords, I am of the same opinion. I understood certainly, at the beginning of the argument, 656] and all through Mr. Bowen's *argument when he was speaking the other day in support of the appeal, the point that was argued to be entirely the one to which my noble and learned friend, Lord Penzance, first alluded, namely, whether or no there was a right to apportion upon a *quantum meruit* the remuneration for the use which had been made of the ship on its voyage in bringing home the cargo which had been shipped under the terms of 1s. a ton freight, obviously a nominal freight.

Now, my Lords, upon that point I think the matter is perfectly concluded by authority. It has been always held

that where a ship has been sold and transferred in the course of a voyage, or where it has been transferred by operation of law, which would be the effect of an abandonment accepted by the underwriters, or a recovery of a total loss, which would amount to a transfer from the time when the loss occurred, in such cases the transferee of the ship takes all the benefits to be got from the completion of the voyage. So far as that goes I think that there is no difference between the law of this country and that of any other country; and I think that would obviously be good and intelligible justice and common sense. But it has been established, in this country at least, that where there is a voyage pending, and there has been a contract made under which a certain sum is to be payable if the voyage is completed, whether it be freight or whether it be charter money would not matter, nothing would be earned unless the voyage were completed, and all would be earned if the voyage were completed. Then, inasmuch as the fag end of the voyage, as we may call it, is performed by the ship after the ship has become the property of the transferee, one would be inclined to say that there should be, in justice and common sense, an apportionment of the earnings. It might be practically very inconvenient to apportion them, but that should in justice be done; however, that is not the law of England according to the authorities from *Davidson v. Case* (1) downwards.

The case in which it has most distinctly arisen is a case where there has been a transfer of a ship during its voyage in consequence of a total loss being recovered from the underwriters, which has the effect of transferring the ship to the underwriters *from the moment of that total loss. [657 The case of *Davidson v. Case* (1) was the first of the kind, but the last case, which was the strongest, was a case which has been mentioned, namely, *Stewart v. Greenock Marine Insurance Company* (2), in this House. In that case the ship having sustained no damage on the voyage home, arrived at the mouth of the harbor of Liverpool, and when about 100 yards from the dock, and going into dock, with the cargo on board, struck on the edge of the dock, and sustained such injuries as resulted in becoming a total loss. The ship was destroyed in fact, although it was afterwards able to get into the dock, and the goods were delivered in Liverpool. That 100 yards or so from the harbor into the dock, which was all that was necessary to complete the earning of the freight, was done by the ship after the accident, which ultimately made a total loss accrue to the

(1) 5 M. & S., 79; 2 Br. & Bi., 379.

(2) 2 H. L. C., 159.

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underwriters, and it was decided in this House, and decided upon authorities which certainly settled the point, that as that distance of 100 yards was performed by the ship after the loss occurred which made it the ship of the underwriters, the underwriters were entitled to take the whole freight; and they did get it. It was very hard on the shipowner, because, although he was insured for freight, he did not recover from his underwriters upon freight, inasmuch as the freight had never been lost. It was lost to him, but it was not lost to the underwriters, because he had sold his ship to the underwriters as a total loss. It was cruelly hard upon him; but that case settled the point that you do not apportion freight. In *Miller v. Woodfall* (') I made a desperate attempt to say that the English law was different, but I could not persuade the Court of Queen's Bench to say that the law differed from that which had been laid down in other cases, harsh as that law is; I take it that it is quite clearly settled.

Mr. Bowen's argument, as I understood it on Tuesday, was that it ought not to be so, that, inasmuch as this mortgaged ship was taken possession of by the mortgagee when it came to Falmouth, having carried the goods from San Francisco to Falmouth, and then went on from Falmouth to Liverpool after the mortgagee had taken possession, the 658] circumstance of the mortgagee taking *possession makes the difference, and inasmuch as he is taken to have carried the goods on to Liverpool, he is not simply entitled to take an apportionment of so much as might be his share upon a *quantum meruit* for carrying the goods on from Falmouth (there would be some show of justice in that), but entitled to take the whole of the earnings of the ship from the time it started from San Francisco, without any contract. I take it, my Lords, that that is not the law at all. In the present case it would obviously not be so, for the shippers of the cargo, Messrs. Parrott & Co., had stipulated, for their security, that if the bills of exchange were not paid the goods, when delivered in England, were to be delivered to them, subject only to a nominal freight of 1s. a ton. They had made an arrangement of this kind: If we take the goods, which we are entitled to do if the bills are dishonored, we shall pay £69 17s., and no more, and then we shall have the goods, which will be a sufficient security for us, because they will be goods carried to England, and no doubt enhanced thereby in value much more than £70. That was the security they had stipulated for; and if the bills of exchange had been dishonored, and Parrott &

(') 8 El. & Bl., 498.

Co. had taken possession of the goods, it would obviously have been monstrous to say that, because the mortgagee had intervened and taken possession of the ship before the voyage was ended, though Parrott & Co. had made their bargain with the mortgagor at the time he was in possession, and when he had a perfect right to make the bargain, the mortgagee could claim from Parrott & Co. more than they and he had agreed to. But even if it had been a shipment originally by the mortgagor himself, without the intervention of Parrott & Co., if he had paid for the goods in San Francisco with his own money, and put them on board, I take it that it would be clear there would not be here any new implied contract, by reason of the mortgagee taking possession, altering the contract under which the goods were originally shipped. They were shipped in San Francisco to be carried without any but the nominal freight, and the taking possession by the mortgagee would not create a contract for freight, or, if it did, it would create a contract only for freight *pro rata*, upon a *quantum meruit*, from the time of the mortgagee taking possession, which in the present case would be at Falmouth. But the authorities show, *and I think *Miller v. Woodfall* (1) is as good an au- [659] thority as can be cited for that purpose, that it does not do so. When the mortgagor's own property is on board, and consequently there is nothing to be paid for freight, the fact of the mortgagee taking possession does not create a contract to pay freight which would entitle him to take it.

But, my Lords, passing from that, in the reply to-day Mr. Bowen has argued with great ability in favor of what certainly seems to be the view (I agree a hasty view) taken by the judges in the Common Pleas Division when the case was before them. They say (2) that although the freight originally was only nominal, "yet in the contract with Jump & Co. the freight payable is agreed to be 55s. a ton, so the freight assigned to the defendants was likewise freight at 55s. The defendants therefore, whether they claim as for Jump & Co., or under the assignments to themselves, are not in a position to deny that the sum payable as and for freight was to be 55s. per ton." Now my Lords, that is putting it on a ground of estoppel. Mr. Bowen did not argue upon the ground of estoppel the other day, and how anything which passed between Jump & Co. and the defendants could operate as an estoppel for the mortgagee who was no party to it, and of whom they had never heard, it is difficult to conceive.

Mr. Bowen does not say that it operates by way of estop-

(1) 8 EL. & BL., 493.

(2) 1 C. P. D., 730.

pel, but that it really was a contract altering the freight. Doubtless it would be quite possible to make such a contract when the goods were coming from San Francisco, and were in the ship belonging to Morison. Morison, if he had paid off Parrott & Co., who held the bills of lading, and had himself become able to do entirely what he liked with the goods, might have made a bargain with a third person. If he had liked, he might then have said: The goods are coming in my own vessel, and I am free if I like now to send them to any place, or (if the goods are not insured) burn them or throw them overboard; I now therefore make a contract with you by which I bind myself to carry them on to their destination on your paying me, not the 1s. a ton originally talked of, but the 55s. a ton. There is no doubt that he could have made such a contract, and if he 660] had made it there would be a contract *to carry the goods on for freight accruing, and if the mortgagee took possession of the ship whilst that freight was still accruing, he would have the benefit of it—of the whole of it—not of the portion which accrued after he took possession.

Doubtless that would be so if such a contract could have been made; but let us look and see whether any such contract has been made. I think it clear that it has not. It must be remembered that Parrott & Co. had a right to hold these goods as a security (paying 1s. a ton and no more) for their bills of exchange. The case says: "The sum necessary to meet the bills of exchange at maturity was £10,364 19s. 4d., and at some time in December, or the beginning of January, it had been arranged between Mr. Morison and the defendants that the defendants should advance to Mr. Morison the moneys necessary for the purpose, that the defendants in return should be at liberty to sell the cargo and receive the proceeds of the sale on Mr. Morison's account, and that the bills of lading and policies of insurance should be deposited with the defendants as security for their advances." I can read that in no other way than as saying that then there was a binding agreement made between Morison and the defendants by which the defendants were to furnish the money which would pay off the bills of exchange, and were to have, as security for that, the bills of lading deposited with them just as Parrott & Co. had them before, that is, real bills of lading which would entitle them to the possession of the property; that they were besides that to have the policies of insurance which were in the possession of Morison; and that for all these advances of theirs they were themselves to have the conduct of the sale of the cargo, the

moneys received for which would therefore pass through their hands and be their security; that was the contract.

On the 4th of January they pay a sum of £3,000 and receive the policies which Morison had got and could then give. They do not pay the money in exchange for the bills of lading until the bills of exchange should become due and the bills of lading should be obtained. On the 2d of February the bills of exchange did become due, and then Morison, with the money advanced by the defendants, did take up the bills of exchange and pay them, and the bills of lading were then handed over to *the defendants. How- [66] ever in the interim a transaction happens on which Mr. Bowen has rested his whole argument. The defendants had a binding agreement for value between them and Morison, and were entitled to have the sale of this cargo, and the proceeds were to pass through their hands. They were entitled to the bills of lading, and they, on their part, had bound themselves to furnish the money necessary for taking up the bills of exchange and something over. Now on that they proceed to sell the cargo. They make a contract. The earlier part of that contract, all but the last three lines, is, I have no doubt, a lithographed form for the sale of a cargo, cost, freight, and insurance, with merely the blanks filled up in writing and the last three lines added in writing. I have seen scores and scores of such contracts, and I have very little doubt that it was a lithographed form that was used.

It must be remembered what the nature of the contract is. It is a contract which is thoroughly well understood amongst merchants. You are to pay a sum down for the cost of the purchase of the goods abroad, for the freight to the port of destination, wherever that may be, and for insurance on the voyage. The mode in which that is carried out is this: the purchaser agrees to pay a sum for those three things. The portion which is measured by the cost and by the insurance is paid by him in exchange for the shipping documents. He parts with no money whatever until he gets those shipping documents, which consist of the bills of lading, the charterparty generally, and the policies of insurance, which are handed over at the time; and then he pays the portion which represents those, but the invoice is always in practice made out in this way. They put down the whole sum, the contract price. They put down what the amount of the freight would be, and then that freight is deducted from the contract price, and what is paid in exchange for the documents is the balance between the freight

and the contract price. The freight is still payable by the contract to the vendor of the cargo; but by the agreement between them, instead of taking a payment down for the amount of the freight, it is agreed that that shall be postponed, and shall not be payable until the ship arrives and the goods are delivered. Then instead of paying it to the 662] vendor of the cargo, *who then would pay the money to the shipowner, it is agreed that this sum for freight shall be paid to the vendor by paying it to the shipowner, who is constituted by the contract his agent to receive it. That is the ordinary way in which the transaction is carried out. That is the legal effect of it, and an invoice made out in that way is perfectly well understood.

Now, in this case, at the time this contract was made, the ordinary rate of freight seems to have been 55s. a ton. When the defendants came to bargain with Messrs. Jump, or their brokers, Messrs. Harris, on their behalf, they very reasonably and sensibly seem to have said this: "We are making a contract, cost, freight, and insurance, but you know that in that way, if it was a contract with an ordinary merchant we should be entitled to keep back 55s. a ton, or £3,793, until the ship arrived; if the ship did not arrive in Liverpool with the goods, we should keep that in our pockets; if it did arrive we should pay it to you, but we should have three months' interest. You are proposing to us to buy, when the freight by the bill of lading is only for 1s. a ton, and the amount of freight would therefore be somewhat less than £70. Instead, then, of keeping back £3,793, we shall only, according to this, keep back £70, and the invoice will be made out deducting only £70 from the £13,440, and so making us pay. We do not approve of that at all." And then the defendants, acting on behalf of Morison, seem to have said what you might suppose they would say, "That is perfectly true and perfectly reasonable; but we will agree to this, that the sum you shall keep back under the contract shall be, not 1s., but 55s., per ton; and the invoice shall be made out in that way, that you are to keep back 55s., and not 1s., and that the sum payable after the arrival of the ship, and which you must pay before you can get the goods, shall be 55s., and not 1s., per ton." Messrs. Jump were perfectly contented with that; it answered their purposes.

Now, my Lords, let us see how they worded this agreement. "As cargo is coming on ship's account, freight is to be computed at 55s. per ton of 2,240 lbs., and invoice to be rendered accordingly." It has been truly said by the noble

and learned Lord on the woolsack that that is inconclusive as it stands. The cargo "coming on ship's account" has nothing to say to the freight *being computed at 55s.; [663 but if you read it with a parenthesis, which was clearly what the parties intended, it becomes intelligible. It would then read in this way: "As cargo is coming on ship's account, the freight is only 1s. per ton, but the sum which is to be kept back by the purchaser (until the goods are delivered) is to be computed at 55s. per ton, and the invoice is to be rendered accordingly." Put in that way it is quite intelligible, and I am convinced that that is what the parties intended to say. They did not intend to say we are making a new bargain on behalf of Morison, by which the contract in the bill of lading of 1s. a ton for freight is to be altered or set aside, and a new one made instead of it, and the freight, which was originally 1s., is now to be actually 55s. They did not say that; Messrs. Jump did not agree to that; they had no object in agreeing to it, but, on the contrary, the defendants had a very excellent reason for not doing it. Morison had no interest in it at all, one way or the other. What they do say is this: for the purpose of the invoice the sum to be deducted shall be reckoned as if the freight was 55s., although it is in the bills of lading only 1s.

That is all they have done, and having done that, there remained only one thing to be thought of, still—not by Messrs. Jump, who would say if they got the goods and paid the money it is well, but by the defendants. They were to deliver the bills of lading on receiving a certain sum and, at the same time to secure that, the 55s. a ton, which was yet to come, was to come into their hands. They stipulated with Morison, apparently, that Morison should indorse on the bills of lading an authority; a thing that should be a notice to Jump that they should be entitled to receive it. Messrs. Jump knew that already, but it would be a notice to Messrs. Jump's assignees who took the bills of lading from them. Morison was to indorse on the bill of lading a notice that Messrs. Burrows & Perks, of London, are the persons entitled to the freight; that their discharge for the 55s. a ton, which is not freight but the sum at which by this agreement the freight is to be computed in the invoice, and to be kept back as freight; that their discharge for that shall be sufficient. Accordingly on the back there is this indorsement. "We assign our interest in the within freight to Messrs. Burrows & Perks, of London, whose receipt, or that of *their appointed agent, will [664 be sufficient discharge. The freight assigned is at the rate

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of 55s. per ton and not the nominal amount of 1s. per ton." I cannot understand how it could be said that that was a fresh contract, saying that the goods should be carried for 55s. a ton instead of for 1s. a ton. It does not profess to alter the contents of the bill of lading at all. It does profess, and it was required that it should profess to do something else; it gives notice to whoever may come with the bills of lading, that Messrs. Burrows & Perks, and they only, are the persons entitled to receive the 55s. a ton; it does not matter whether that 55s. a ton is part of the price, or is freight.

That being so, when the defendants had received the bills of lading, they took them to Jump, and got from Jump the invoice price as made out, and then come Messrs. Ross, who had become Jumps' assignees, ready to pay the 55s. a ton. But it is said on the part of the mortgagee who has come into possession of the ship: this 55s. a ton is not part of the contract price to be paid under the contract with Jump as if it had been freight, but it is freight actually created by some fresh contract,—I do not know what;—the parties have entered (it is said) into a new contract—I cannot see how—I do not think that that was the effect of it or that that was ever intended. There is nothing to show that was the intention of the parties, and there is no rule of law whatever which says that we are to put that intention on the parties, or to put them under a contract other than that which they intended to enter into.

Taking that view of it, my Lords, it seems to me quite clear that the mortgagees' claim is unfounded, and consequently it appears to me that the unanimous opinion of the Court of Appeal is the right one, and that this appeal should be dismissed with costs.

LORD GORDON: My Lords, your Lordships have given very anxious consideration to this case, but not more consideration than I think it is entitled to, both with reference to the amount which is in dispute and with reference to the principles which are involved in it. I think it is admitted 665] on all hands that the plaintiffs, the *appellants in this case, are entitled to claim the accruing profits arising from contracts which were in operation at the time they took possession of the vessel. But the contract which was in operation with regard to the cargo in question, the shipment from San Francisco, was for a nominal freight. We know the reason why that was adopted, why instead of a freight of 55s. a ton which was the current freight, or at least the usual freight at the time when it came to be delivered, the

bill of lading under which the appellants were entitled to claim, stipulated for only 1s. a ton. The appellants do not rest their case of course upon that, because then the respondents would be entitled to prevail, as the respondents have offered 1s. a ton; but the appellants say that they were entitled to enter into a new contract when the cargo had come to this country, and that in point of fact they did enter into a new contract. Now, I believe it is not disputed, it is assumed by your Lordships, that there might be circumstances under which they might be entitled to enter into a new contract; but the difficulty arises upon the question whether there was in point of fact, a new contract so entered into or not. There was no such new contract and I therefore concur in the judgment proposed.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 12th July, 1877.

Solicitors for appellants: *Freshfields & Williams.*

Solicitors for respondents: *Lowless & Co.*

[2 Appeal Cases, 666.]

H.L. (E.), July 16, 1877.

[HOUSE OF LORDS.]

***ALEXANDER BROGDEN and Others, Appellants; and [666
THE DIRECTORS, &c., OF THE METROPOLITAN RAILWAY
COMPANY, Respondents.**

*Contract—Absence of a formally signed Contract—Conduct of Parties supplying the
Want of it.*

Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either.

In such a case the word "approved" written by one of the parties at the end of the draft agreement must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form.

B. had for some years supplied the M. Railway Company with coals. At last it was suggested by B. that a contract should be entered into between them. After their agents had met together the terms of agreement were drawn up by the agent of the M. Company and sent to B. B. filled up certain parts of it which had been left in blank, and introduced the name of the gentleman who was to act as arbitrator in case of differences between the parties, wrote "approved" at the end of the paper, and signed his own name. B.'s agent sent back the paper to the agent of the M. Company, who put it in his desk, and nothing farther was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper, coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the M. Company, there were explanations and excuses given by B., and the "contract" was mentioned in the

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correspondence, and matters went on as before. Finally disagreements arose, and B. denied that there was any contract which bound him in the matter :

Held, that these facts, and the actual conduct of the parties, established the existence of such a contract, and there having been a clear breach of it B. must be held liable upon it.

B. was the chief partner in a partnership of three persons. The word "approved" written by him and signed with his name was treated as an assent binding on all the partners (whose names were mentioned in the paper), although the usual form of signature of the partnership was that of "B. & Sons."

A mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon those terms, by sending coals in the quantities and at the 667] prices mentioned in it, amounted to sufficient to show the *adoption of the writing previously altered and sent, and to constitute it a valid contract.

Per LORD BLACKBURN : The *onus* of showing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance.

In this case the directors of the Metropolitan Railway Company had brought an action against Messrs. Brogden & Co. to recover damages for a breach of contract. The defence was that there was no such contract. The cause was tried before Mr. Justice Brett, at the Surrey Spring Assizes of 1873, when a verdict was found for the plaintiffs, subject to a special case.

The defendants in the action (the present appellants) were colliery owners in Wales. From the beginning of 1870 the defendants had supplied the plaintiffs with coal and coke for the use of their locomotives. The quantities supplied and the prices charged were sometimes varying, and it appeared that, in November, 1871, a suggestion was made in writing by Mr. Hardman (the manager for the defendants) that a contract should be entered into between the parties. Mr. Burnett, an officer of the company, was appointed to meet Mr. Hardman and to make some arrangement, and the result of the communications between them was that a draft agreement was drawn up. This draft contained the following sentences : "The contractors [which meant Brogden & Co.] shall, at their own expense, as from the 1st day of January, 1872 (but subject as hereinafter expressed) supply every week and deliver, in narrow guage railway wagons, for the use of the company, at the Paddington Station of the Great Western Railway, 220 tons of coal, and any farther quantity of coal, not exceeding 350 tons per week, at such times and in such quantity as the company shall, by writing under their agents' hands, from time to time require." The coal was to be "from the best Bwllfa Merthyr four-feet seam" and from no other. The payment was to be at the rate of 20s. per ton of 20 cwt., the money payable for the same being subject to the existing tolls payable at the date of the agreement to the Great Western Railway Company,

“but should the existing tolls be advanced or reduced, the price per ton to be advanced or reduced accordingly.” Should the contractors make default or become bankrupts, the company was to be at liberty to *terminate the [668 agreement by notice. Provisions were made as to strikes, and differences arising between the parties were to be settled by arbitration. Either of the parties was to have liberty to “determine this agreement by giving two calendar months previous notice in writing on the 1st day of November, 1872.” If no such notice was given the agreement was to continue in force “for one year from the 1st of January, 1873,” both parties agreeing to fulfil and observe the agreements and provisions herein contained, so far as they may then be applicable to existing circumstances. If any differences should arise they were to be referred to “the arbitration of ———, and such person or persons as shall be mutually agreed upon.” Such arbitrators to have all the powers given by the Common Law Procedure Act, 1854.

This paper was prepared by Mr. Burnett, who handed it to Mr. Hardman for approval by the defendants. Mr. Hardman submitted it to Mr. Alexander Brogden, the head of the firm of Brogden & Co., who dealt with it thus: He left the date in blank. He filled up the part describing the parties by putting in the names of himself and partners. He introduced the word “Upper” after the words “Bwllfa Merthyr.” He altered one of the sentences by substituting the words “during the period of” for the words “while they shall fulfil.” He filled in the arbitration clause with the name, “William Armstrong, Esq., of Swindon,” and, finally, he appended the word “approved,” and under it signed his own name, “Alexander Brogden.” He gave the paper back to Mr. Hardman to be returned to Mr. Burnett for the purpose (as it was said) of having a formal contract drawn in duplicate and signed by the respective parties. If such formal contract had been drawn it would have been signed “Alexander Brogden & Sons,” instead of merely “Alexander Brogden.” No formal copy was made. Mr. Hardman returned the paper to Mr. Burnett, inclosed in a letter dated the 21st of December, 1871, which letter contained these words: “Herewith I beg to return your draft of proposed agreement, *re* new contract for coal, which Mr. Brogden has approved. I am obliged to leave town for Bristol to-night, and shall be up again on Monday week. If you have anything farther to communicate letters addressed to Tondū” [the appellants’ collieries] “will find me.” Mr. Burnett (who was the proper *custodian [669

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of the company's contracts for the supply of coke and coal) put the paper into his drawer where it remained. No entry of it was made in the books of the company. On the 22d of December Mr. Burnett telegraphed "we shall require 250 tons per week of locomotive coal commencing not later than the 1st of January next," and sent off a letter the same day to the same effect. Mr. Hardman answered, "we have arranged to supply you quantity you name, 250 tons weekly, from the 1st of January." The supply of coals appeared to have been made for some time upon the terms stated; but sometimes there was a failure of the regular supply, and many letters passed between the parties. In most of the letters the contract was referred to. Excuses were made and deficient supplies made up, till finally, in December, 1873, the Messrs. Brogden declined to continue the supply of coals in that manner.

An action for damages as for breach of contract was then brought. The defendants denied the existence of any contract for the supply of coals. The special case was argued before the Court of Common Pleas, and judgment was ordered to be entered for the plaintiffs, and the damages were assessed at £9,643. The case was carried to the Court of Appeal, where Lords Justices of Appeal, Bramwell and Amphlett, were for affirming the judgment, Lord Chief Justice Cockburn thinking that it ought to be reversed.

This appeal was then brought.

Mr. *Herschell*, Q.C., Mr. *Davey*, Q.C., and Mr. *Beresford*, for the appellants.

The *Solicitor-General* (Sir *Hardinge Giffard*), and Mr. *W. G. Harrison*, Q.C., for the respondents.

The case was at first argued before Lord Hatherley, Lord Blackburn and Lord Gordon. A second argument, by one counsel on a side, was directed, and that took place before the Lord Chancellor (Lord Cairns), Lord Hatherley, Lord Selborne, Lord Blackburn, and Lord Gordon. On the second argument the respondents' counsel were not called on to address the House.

Mr. *Herschell*, Q.C., Mr. *Davey*, Q.C., and Mr. *Beresford*, were for Messrs. Brogden, the appellants.

670] *The *Solicitor-General* (Sir *Hardinge Giffard*) and Mr. *W. G. Harrison*, Q.C., were for the respondents.

For the appellants it was contended that there had not been any completed agreement. It might be admitted that if there had been a writing drawn up, seen and considered by both parties, and signed by one of them, and the assent of the other declared, and if then the terms so written had been

acted upon by both, a contract would have been constituted. But that was not the case here. And yet if the plaintiffs could not show that such was the case (and the burden of proof was on them) they could not maintain their action. All that had been done was to sketch out what was proposed on the one side, to send that sketch to the other side, and the word "approved" had been written by one of the partners of the firm, and signed with his own name and his own name alone, and not with the proper style and designation of the firm, which was not sufficient, as to the firm, to constitute a valid and binding contract. The case of *Ridgway v. Wharton* ⁽¹⁾ distinctly declared that a paper sent by one party to the solicitor of the other to put it into form would not be sufficient to constitute a contract, unless both agreed that that was the only purpose for which it was sent, for that the act of so sending it afforded generally cogent evidence that the parties did not intend to bind themselves until it was reduced into form. That rule was exactly applicable here. The mere fact that the parties for some time dealt together on the prices mentioned in the paper here insisted on as the contract, was nothing, for there had been different prices on which their dealings had proceeded before any contract was proposed. *Dunlop v. Higgins* ⁽²⁾ showed that an offer of a contract was not sufficient; there must be a distinct acceptance of it. Here there could have been no acceptance of it. Blanks in the draft had been filled up in a certain way, and a name had been introduced. These were all suggestions which the party to whom they were made might or might not adopt. Till they were adopted they were mere propositions for an agreement, and not parts of a concluded agreement. If the party to whom they were proposed refused to adopt them the proposed *contract was not completed. *Warner v. Willing-* [671 *ton* ⁽³⁾], which was the case of a bill for specific performance, much resembled the present, and showed that there had not been any unconditional acceptance. Where there remained anything to be done to indicate the acceptance and adoption of what had been suggested by one of the parties, the other was not bound, and no contract was constituted: *Jackson v. Turquand* ⁽⁴⁾. Circumstances such as existed here would not even establish the liability of a contributor upon shares in a company: *British, &c., Telegraph Company v. Colson* ⁽⁵⁾.

⁽¹⁾ 6 H. L. C., 238-9.

⁽²⁾ 1 H. L. C., 381.

⁽³⁾ 3 Drew., 523; 25 L. J. (Ch.), 662.

⁽⁴⁾ Law Rep., 4 H. L., 305.

⁽⁵⁾ Law Rep., 6 Ex., 108.

For the respondents it was argued that everything had been done here which was necessary to constitute a binding contract. A proposition had been made, the duly authorized agents of the two parties had met to consider it; what they had agreed to was reduced into writing, with only such blanks as could easily be filled up, without the fillings-up constituting in the least degree (except perhaps in the name of the arbitrator) new propositions; the paper was sent to one of the principals, and he returned it to the other with the word "approved," and with his signature attached. As to the name of the arbitrator, if that was to be treated as a new proposition, it was a proposition made by Mr. Brogden, and at once accepted without observation by the other side. There needed nothing more. The case did not in the least resemble *Ridgway v. Wharton* ⁽¹⁾ nor *Dunlop v. Higgins* ⁽²⁾, nor any of those cases in which either one side alone had acted, or one had sent the other proposals as to which no assent had been given. Here both parties had acted upon the terms proposed. The person who now refused to acknowledge the contract had examined and considered it, and had written that he "approved" it; he was the head of his firm, and his signature was binding; and the other party to whom it was then returned had accepted it as so "approved;" and both parties had for some time and in repeated dealings acted on it, and, in the various letters which had passed between them, whether letters of complaint or 672] otherwise, had *referred to it again and again as the contract under which they were conducting their dealings. There was nothing said here, as there had been in *Ridgway v. Wharton* ⁽¹⁾, about putting the contract into form; it was sent, examined, and "approved;" it was therefore complete, and it was so received and was acted on.

THE LORD CHANCELLOR (Lord Cairns): My Lords, there are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the parties. But, on the other hand, there is no principle of law better established than this, that even although parties may intend to have their agreement expressed in the most solemn and complete form that conveyancers and solicitors are able to prepare, still there may be a *consensus* between the parties far short of a complete

⁽¹⁾ 6 H. L. C., 238.

⁽²⁾ 1 H. L. C., 381.

mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description; I mean imperfect and incomplete as regards form.

My Lords, it was owing to the circumstance that your Lordships had in this case to deal with a voluminous correspondence, and that you had not a formal completely executed agreement between the parties, that your Lordships desired to have the case argued a second time before you ultimately disposed of it; but having had that argument on the part of the appellants, and having heard from their very learned counsel everything which could be urged in support of the appellants' view of the case, it appears to me, and that seems also to be your Lordships' view, that there is not any necessity for considering the case beyond the point which it has already reached.

Now, my Lords, the facts of which I shall have to remind your Lordships for the purpose of expressing my opinion, need not range over any great length of statement. There is no doubt that *before the 18th of November, 1871, [673 the firm of Messrs. Brogden & Co. had been in the habit of supplying the plaintiffs, the Metropolitan directors, with coal, and occasionally with coke, for the purpose of their railway. The exact prices which were paid prior to the close of the year 1871 are not set forth in the case, but I think it may be inferred from the documents I am about to mention, what the general character of those prices was. On the 18th of November, 1871, the firm of Brogden & Co. wrote to the railway directors in these words: "We beg to hand you statement showing the increase in price of our smokeless locomotive steam coal as supplied to you. The present price is 18s. 3d. Increased railway rate, 7d. Ten per cent. for increase of wages, 9d. The price of this particular quality of coal has advanced from 2s. 6d. to 3s. per ton in the market, and we have every reason to believe that it will continue to increase. We shall, however, be willing to make a contract with you for 300 or 400 tons per week at 20s. per ton of 20 cwt., delivered at Paddington. The supply to be for twelve months and subject to the usual conditions for strikes, and increase or decrease if the railway rate is changed. We also beg to state that we must add 7d. per ton to the price for nut coal, being the increase in railway rate." Now, my Lords, that is a letter which explains very clearly its object. There was a rising market, and it was the opinion of the coal producers that the market was going to continue to rise; they state the price which it

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had already reached, and they tell the railway directors that they will be willing to make a contract for the ensuing year for a certain maximum supply per week, at a fixed price which would be free from any future variations of the market, and the only casualties to which it would be subject would be the contingency of strikes and an increase or decrease of the railway rate from their pits.

No answer appears to have been given to that letter for a month, and on the 18th of December, 1871, the engineer of the railway company writes to the Messrs. Brogden, asking for an interview with their representative, relative to the proposed contract for coal. The interview was arranged at once, "with reference to proposed new contract for coal."

My Lords, I dwell upon those expressions for the purpose 674] of *reminding your Lordships that the parties were approaching to a meeting for a definite and clearly expressed purpose, namely, to make a contract, which was to last for a considerable length of time, and it will be one of the observations in the case, that the view taken by the appellants in this case leaves your Lordships entirely without any explanation of what ultimately became of that contract which the parties, clearly, were seriously bent upon agreeing to in some form or other.

However they had this meeting on the 19th of December, and the case finds that at that meeting the representative of the railway company handed over the form of contract or agreement. The date was in blank, the names of the Messrs. Brogden were not filled up, and, in the clause with regard to arbitration, the name of the arbitrator was also left blank; the price was fixed in the way which had been mentioned in the letter at 20s. a ton, and the continuance of the agreement was to be for a twelvemonth, to run on for another twelvemonth if a notice was not given to terminate by the 1st of November, 1872. This draft, or the agreement in this form, was handed over at this meeting to the Messrs. Brogden or to their agent. On the 21st of December, losing therefore no time, and showing that the parties at this time were clearly bent upon concluding the business, Mr. Hardman, the agent of Messrs. Brogden, returns the draft agreement with this letter: [His Lordship read it, see *ante*, p. 668.] The last sentence is important.

Now what had been done with the agreement was this: The date was left in blank as it stood before: the blank with regard to the names was filled up by the introduction of the proper names of himself and his copartners. The word "upper" was introduced before the words "four-feet

seam.” But that appears to me, I may say in passing, to have made absolutely no difference, because either it would have become a different seam, which is not suggested, or if it was the same seam it was merely selecting one part of the seam which it would, without that, have been in the power of Messrs. Brogden to select; and in the 3d paragraph of the letter Mr. Brogden “drew his pen through the words ‘while they shall fulfil,’ and interlined in their place the words ‘during the period of,’ so that the clause read, ‘The company shall pay to, *or according to, the direction [675 of the contractors every month during the period of this agreement.’” This seems to me also to make no substantial difference in the terms. Then “he filled in the blank in the arbitration clause with the name of ‘William Armstrong, Esq., of Swindon,’” and “he put the word ‘approved’ at the foot of the paper and signed the paper with the name ‘Alexander Brogden.’”

Therefore, my Lords, subject to this question about the arbitrator’s name, the document became a document signed by a gentleman who was signing clearly as one of the three persons named as partners in the agreement, and it was signed therefore necessarily upon their behalf; and, although the word “approved” is added, that is a word which in this case could not at all have the meaning which the word frequently has in drafts. Often when a draft is signed by a solicitor or a conveyancer as “approved,” the word “approved” means nothing more than that the legal form and expression of the instrument is approved. Here the word “approved,” signed by one of the partners, could have meant nothing else than this—that he approved of the terms of the agreement on behalf of the partners.

My Lords, the only thing remaining was, as I have said, the insertion of the name of the arbitrator. I quite agree that that required the assent and approval of the railway directors. When they saw the name inserted they might have said, if they had been so minded,—We are not satisfied with this arbitrator—we do not treat this as a concluded agreement between us, we therefore require you to enter upon the negotiation in another form, and we are perfectly free to refuse what you have hitherto proposed. My Lords, it appears to me that it was with regard to the circumstance that there had been the insertion of this name among other matters, that the letter of the 21st of December contained the words to which I have already called your Lordships’ attention, “If you have anything farther to communicate, letters addressed to ‘Tondu’ will find me.” That appears

to me to be just what you would have expected, namely, that Mr. Hardman, on the part of Messrs. Brogden, writes to Mr. Burnett: "I send you back the draft of the agreement with the alterations we have made in it; it is now for you to say 676] whether there is anything *farther to be remarked upon the matter; if there is I here communicate to you my address."

My Lords, that draft having been sent in this form to the railway directors, the statement in the case is that "Mr. Burnett was the proper custodian of contracts for the supply of coke and coal for the plaintiffs. On receipt of the paper inclosed in Mr. Hardman's letter he put it into his drawer, and it remained there till the 7th of November, 1872, when it was produced to Mr. Alexander Brogden on the occasion hereinafter mentioned."

Now, my Lords, I will call your Lordships' attention to what was done subsequent to this date; but before I do so, there is at the very outset this remarkable circumstance, which your Lordships will bear in mind: these two parties having been in negotiation up to the 22d of December, both of them clearly bent upon making a contract which was to provide for a supply of coals in the following year, both of them engaged upon it, and so seriously engaged upon it that they had reduced it into writing with very considerable minuteness of detail; according to the view of the appellants, this agreement, which they were so bent on forming, is said suddenly and without any kind of explanation to have passed entirely out of view, an incomplete and unfinished transaction, as regarded which there never was any *consensus* between them, and no explanation is given in any shape or form of why it was, according to the view of the appellants, that there never was any reference afterwards to the contract, nor any proceeding taken to have it brought to a definite point. My Lords, it would be, indeed, a very strange matter if, both parties having shown such earnestness in the business to which they were addressing themselves, they were from the moment of the 22d of December to be held to have parted without any impression whatever that anything had been done towards accomplishing the object of that act upon which they were bent.

But, my Lords, what took place afterwards was this: On the 22d of December Mr. Burnett, getting this draft, putting it where the contracts of the company were placed for custody, writes in return to Messrs. Brogden & Sons. He makes no objection to anything which had been done with regard to that document; he is silent upon that subject, but

he says, "We shall require *250 tons per week of [677 locomotive coal, commencing not later than the 1st of January next"—the very date which was the date mentioned in the contract for the commencement of the supply—"Reply by wire that you will do this, that we may arrange with other collieries accordingly." My Lords, the contract had provided, with regard to the amount of the supply, that it should be "220 tons of coal, and any farther quantity of coal not exceeding 350 tons per week, at such times and in such quantity as the company shall by writing under their agent's hands from time to time require, such notice to be given to the contractors or agents of the contractors for the time being."

Now reference was made to this letter, and some argument was raised upon it to the effect that it was a letter asking Messrs. Brogden to reply by wire whether they would supply the 250 tons, and that it was therefore inconsistent with a right to order that supply. My Lords, it seems to me to be the most natural letter possible for persons who had a contract to have written. They order a supply within the terms of the contract greater than the minimum, which was 220 tons, but within their power as regards the maximum; and it seems to me that, inasmuch as they had to give notice with regard to the times and the mode of any supply over 250 tons, it was only what men in that position would have done, to ask those who had to make that supply whether they might depend and rely upon their affording it at the times and in the quantity which were thus specified.

My Lords, on the 22d of December Messrs. Brogden & Sons telegraph to the railway directors, "We have arranged to supply you quantity you name, 250 tons weekly, from 1st January." And without going through the letters as to the change of supply, I may say that the quantity was afterwards changed to a quantity of 350 tons per week, which also was a quantity not beyond the maximum mentioned, but the actual maximum mentioned by the contract.

Now, my Lords, what I have to ask myself is this: the draft having been returned with only one variation to which, as far as I can see, any objection could have been taken, namely, that with reference to the arbitrator, and no objection having been made upon the score of the insertion of his name, although any communication *which might [678 have been made must distinctly have been made in writing; I have to ask, how is the course of action of the parties—the suppliers of coal and the railway company—during the following year to be accounted for? In the first place, my

Lords, the railway directors commence by ordering a supply exactly at the date specified in the contract; and, in the next place, and this is a point which I am bound to say appears to me not in any way to have been met by the very able argument we have heard, and yet to be all important in the case—the price from that date, the first of January, commences to be, and continues to be, throughout the year, the very price stipulated for in the contract. And farther, that price is a price differing from the price which had prevailed up to that time. And not only is that so, but during the whole of the year, when, of course, the market price was varying from time to time, this price never changes; it is an unvarying price throughout the year. And, my Lords, more than that, to that price there are added upon two occasions exactly the sums which by the contract might be added, namely, the sum of 5*d.* in the one case, and 6*d.* in the other, upon the charge of the Great Western Company being raised for the carriage of the coal. Then, my Lords, not only does the supply commence at the time mentioned in the contract, not only is the price the price which is explained by the contract, and cannot be explained in any other way, but in addition to that, the quantity is the quantity mentioned in the contract, and during the greater part of the year is exactly the maximum quantity authorized by the contract to be required.

Farther than that, your Lordships have in one of the letters a reference which, again I must say, has not in any way been explained to my satisfaction, and which I am unable to explain except by referring it to this contract—I refer to a letter of the 25th of July, 1872. “We find,” says the agent for Messrs. Brogden, “that from 1st January to June 30th you received 8,835¹⁵/₁₆ tons, which equals 340 tons per week, or about 40 tons per week more than your contract.” I have asked what is the meaning of the expression “more than your contract” there? and no explanation has been given of it. No explanation can be given of it unless it 679] refers to the contract in question. It is quite *true that, as it is said, the contract in question did not provide for a maximum of 300 tons per week, but of 350. My Lords, that may be so, but an error as to the maximum mentioned in the contract does not make it any the less a reference to the contract, and the letter cannot be explained in any other way. I think I can see how it came to pass that Messrs. Brogden spoke of the maximum supply as being 300 tons. I think it arose in this way: When they themselves first proposed the contract they had proposed a contract for a

supply of 300 or 400 tons, and it may well be that, not having kept a copy of the contract, they may, in a loose way, have thought that 300 tons had been the agreed upon amount which they had to supply under the contract. However, whether that was so or not appears to me to be quite immaterial. Here is an express admission by them, which it seems to me to be impossible to get over, that they were supplying coals under a contract, and no contract can be suggested except the contract to which I have already referred.

But, my Lords, over and above that, I must say that having read with great care the whole of this correspondence, there appears to me clearly to be pervading the whole of it the expression of a feeling on the one side and on the other that those who were ordering the coals were ordering them, and those who were supplying the coals were supplying them, under some course of dealing which created on the one side a right to give the order, and on the other side an obligation to comply with the order. If it had not been so, I cannot conceive how when there were these repeated complaints against the Messrs. Brogden for short or irregular supplies, and when they say more than once that the prices they were receiving from the Metropolitan Company did not make their bargain a good one, or did not make the Metropolitan Company good customers, how it was that if they did not feel that there was a contract somewhere or other entitling the Metropolitan Company to a supply, and binding them (the Brogdens) to supply coal, they did not say, If you do not like the mode in which we are supplying, or the extent to which we are supplying, it is quite easy for you to get your supplies elsewhere, and we are under no obligation to supply you: They do not do that; on the contrary, they go on asking for indulgence and consideration in a way which *it appears to me to be impossible to account [680 for, except upon the footing which they recognize in the letter I have read of the 25th of July, that there was a contract under which there was some maximum or other up to which they were bound to supply the coal.

My Lords, those are the grounds which lead me to think that, there having been clearly a *consensus* between these parties, arrived at and expressed by the document signed by Mr. Brogden, subject only to approbation, on the part of the company, of the additional term which he had introduced with regard to an arbitrator, that approbation was clearly given when the company commenced a course of dealing which is referable in my mind only to the contract,

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and when that course of dealing was accepted and acted upon by Messrs. Brogden & Co. in the supply of coals. Therefore, my Lords, I am of opinion that the conclusion at which the Court of Common Pleas arrived was correct, as was also the conclusion at which the majority of the Court of Appeal arrived.

My Lords, I am bound to say, with regard to the very elaborate judgment of the Lord Chief Justice, that, if I could as a matter of fact arrive at the conclusion in one respect at which he arrived upon the question of fact, I should be very much inclined to concur in the whole of his judgment. As I understand it from the passages to which I have referred in the judgment of the Lord Chief Justice, which I will not read again, it was the opinion of the Lord Chief Justice that, to use his own words, the court might "safely infer" that the applications to the Metropolitan Company which are mentioned in one of the letters had actually been made. The Messrs. Tahourdin, the solicitors for the company, no doubt being instructed that such was the case, had stated in their letter that the agent of Messrs. Brogden "afterwards repeatedly, at intervals, applied to the company's agent for the agreement to be completed, but could never obtain it, and was in fact told that there was no agreement, and, at all events, though often applied to thus, the company have taken care never to place themselves in a condition to be charged by Messrs. Brogden upon the alleged contract in case of breach on their part." My Lords, if I [681] found it proved that an application had *been made by the Messrs. Brogden to the railway company for an agreement, and to have the agreement or contract completed, and that they had been told that there was no contract and no agreement, it seems to me that it would have gone far to answer all the observations I have already made. But I have no doubt that if the Messrs. Tahourdin had found that they had been correctly informed when they made this statement, they would not have failed to prove, and they would have had the means of proving, before the arbitrator who stated the special case, the facts which thus they state in their letter. I take it that it must be inferred from the fact that no such proof was given, that no such proof could be given, and therefore these statements must entirely be removed out of the case. And, they being removed out of the case, I cannot but think that the judgment of the Lord Chief Justice is deprived of what would have been one of the strongest arguments in support of it.

My Lords, I must move your Lordships that the judg-

ment of the Court of Appeal be affirmed, and that this appeal be dismissed with costs. In one respect one cannot help feeling some anxiety, as I have felt about the case throughout, because one cannot help believing that, whether from carelessness or not I know not, Messrs. Brogden had not actually in their possession a copy of the agreement, and that in all probability they were not aware that the 1st of November was the last day on which they could have terminated the agreement, as probably they would have terminated it without entering upon another year. With that, however, we cannot deal, we must administer the law as the rights of the parties really stand.

LORD HATHERLEY: My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. I cannot but feel great satisfaction at the case having been heard on a reargument before your Lordships, because, not only is it one of considerable importance to the parties on both sides in point of amount, but the case, it seems, had been argued in the courts below before no less than seven of Her Majesty's *judges—judges of great eminence⁽¹⁾—and a contra- [682] riety of opinion on the part of one at least of those learned judges had been expressed as regarded the conclusion proper to be come to; in this respect differing from the majority in each court.

My Lords, Mr. Herschell, in his extremely able argument in this case, has given us every assistance that we could wish to have for its determination, and has, as it appears to me, put the case on a very proper foundation, when he says that he will not contend that this agreement is not to be held to be a binding and firm agreement between the parties, if it should be found that, although there has been no formal recognition of the agreement in terms by the one side, yet the course of dealing and conduct of the party to whom the agreement was propounded has been such as legitimately to lead to the inference that those with whom they were dealing were made aware by that course of dealing, that the contract which they had propounded had been in fact accepted by the persons who so dealt with them. That really is the case which we have to try: [His Lordship here stated the facts of the case.]

(¹) In the Common Pleas Lord Coleridge, Mr. Justice Brett, Mr. Justice Grove, and Mr. Justice Lindley. Their judgment was affirmed in the Court of Appeal by Lord Justice of Appeal Amphlett, and Lord Justice of Appeal Bram-

well; Lord Chief Justice Cockburn dissented. The case was not reported in the court below, but the opinions of the judges were referred to in some of the judgments delivered in this House.

When I look to the agreement, I find that the draft agreement is founded upon a letter, although not prepared immediately upon the receipt of the letter, and is in accordance with that letter in respect of the price, in respect of the arrangement for strikes, in respect of the arrangement for increase or decrease if the railway rate is changed, and in respect of the arrangement as to time—that it is to be for twelve months. All those matters we find in the letter of the 18th of November, and that letter having been written by Messrs. Brogden had been considered by Mr. Burnett on behalf of the railway company. Mr. Burnett, in addition to these matters, which I have referred to as being embodied in the letter of the 18th of November, adds a clause by which, instead of saying vaguely that the supply shall be 683] between 300 *and 400 tons per week, says definitely that the supply shall be of 220 tons of coal per week, or a farther amount not exceeding 350 tons (splitting the difference between the 300 and 400 tons) “per week at such times and in such quantity as the company shall by writing, under their agent’s hand, from time to time require, such notice to be given to the contractors or agents of the contractors for the time being.”

Then Mr. Burnett puts into the agreement a clause for the benefit of his employers, the company, which is this, that in case “the company find it expedient to suspend the use of coal by reason of its being found by them to be detrimental to the atmosphere of the railway, owing to high temperature in summer or otherwise, and to use in lieu thereof coke, they shall be free to suspend the use of coal for the time being, and the time or times during which the company shall be required to take the coal shall be enlarged to correspond with the period or periods of suspension.” That is a new clause which I do not find in the letter of November the 18th. I find also a second new clause, and a very important one, inasmuch as it gives rise to the present claim in this action. It is a clause providing that in default of notice being given by one or other of the parties two calendar months before the expiration of the twelve months, the agreement shall go on for another twelve months. That together with the appointment of an arbitrator, makes all that you find in the agreement in addition to what is contained in the letter of the 18th of November.

Now, I mention these facts to show how very little there was for either of the parties to consider. It was not necessary to take a long time for consideration, and the importance of this part of the case is with respect to the view

which was taken by the learned Lord Chief Justice who differed from the other judges in his conclusion upon the case, namely, as to whether or not it was contemplated when this agreement was put into writing, that there should be a farther formal agreement in the sense of a formal agreement to be considered by the solicitors on both sides, and to have such variations made in it, I suppose, as those solicitors might suggest, or anything of the kind. My Lords, instead of that it is a plain simple practical agreement confined *to very few particulars, such particulars as Mr. [684 Hardman on one side, and Mr. Burnett on the other, who were both practical men, were perfectly competent to form an opinion upon.

That being so, I apprehend, my Lords, that the case is entirely outside the class of authorities referred to in the judgment of the Lord Chief Justice, in which it has been said that under the peculiar circumstances of the case, if it be clearly and definitely intended that the matter shall not be concluded until it has been not only arranged but settled, and put into a formal shape, that intention will, of course, prevail, and it will not be held to be concluded until such formal shape has been superinduced upon it, and it has been settled as intended by the parties, and of course there will be a *locus pœnitentæ* until that matter has been achieved.

Here, instead of that, we find that the draft, as prepared by Mr. Burnett, is sent to Mr. Hardman for approval, and then submitted by Mr. Hardman to Mr. Alexander Brogden, who was a person fully authorized to act on behalf of the defendants' firm. [His Lordship here described what had been done by Mr. Brogden before the paper was returned to Mr. Burnett.]

My Lords, the case states that "after so dealing with the paper, the said Alexander Brogden gave it back to Mr. Hardman to be returned to Mr. Burnett for the purpose of having a formal contract drawn in duplicate, and signed by the vendors and the purchasers, and the formal contract if so drawn and signed would have been signed John Brogden & Sons, and not Alexander Brogden," and no doubt it would also have had the seal of the company. But that is not at all the class of changes and alterations which is aimed at in those cases to which I have already referred as having been cited, with reference to whether or not the parties should be bound until the formalities had been complied with. Here there really was nothing to be done on the part of the colliery owners, because they had settled and approved of this;

nor was there anything to be done on the part of the railway directors beyond an intimation of whether or not they intended to act upon that document so signed, and with such variations as I have described.

Now, my Lords, what took place? This document, so 685] dealt with *and so handed over to Mr. Hardman as signed by Mr. Brogden, was given to Mr. Hardman to be returned to Mr. Burnett: [His Lordship stated what had then taken place, and quoted at length several letters on the matter of the supply, and the complaints that it was deficient, and excuses on account of the colliers not working, and promises to send the required supplies.]

Now, my Lords, I apprehend that if it had stopped here, this is a course of action from which the inference would fairly be drawn which becomes quite conclusive afterwards. Up to the present stage to which I have brought it the case stands thus: Agreement proposed first of all by the coal company, sent as a proposition to the railway company, converted by the railway company into a definite agreement with some very slight alterations, sent back again with these few alterations and then adopted and approved by the coal company with only one important farther alteration, namely, the insertion of Mr. Armstrong's name as the arbitrator—a letter written with it by the person engaged in the whole negotiation on the one side, saying that he could not see the person who was negotiating on the other side until the time when the agreement was to come into effect—that immediately followed by an order for coals to the extent of 250 tons—an inquiry sent by telegram, and an anxious inquiry by letter also saying: "Let us know whether we can rely upon your supplying us with 220 tons of coal per week, because, upon your answer whether you can or cannot supply us with that quantity will depend the arrangements I am to make with other coal companies in the north."

It was said that this was inconsistent with the plaintiffs having an agreement by which the defendants had bound themselves to supply that quantity of coal. I do not see any such inconsistency whatever. It might possibly bear on the question of whether the agreement was actually clenched at that moment or not. It might indicate this: If you cannot answer definitely that you can supply us with the 250 tons of coal, we may feel ourselves at liberty then to deal with the other coal companies—that might possibly be the true view of it, in which case it struck me it might be said that it was not *eo instanti* that the agreement was clenched. However, what followed did clench it most distinctly, be-

cause *there not only comes the answer, "We can [686 supply you with the quantity, which is all you want to know in making your arrangements with the other companies"—not only do they say they can do it, but they do it, they send it at the time proposed, namely, January, and invoice it at the price mentioned in the agreement, which differs from the price at which they formerly invoiced it. And at a subsequent part of the transactions, when they were reproached for not sending the supplies in the quick, orderly and regular manner in which the plaintiffs conceived they were entitled to receive them, all they said in reply was: "We are sending you as much as you are entitled to receive by contract." It is that remarkable letter which the Lord Chancellor has already commented upon, namely, the letter saying, "We have sent you a quantity exceeding that which you are entitled to per contract." I think the mistake in the quantity when they say "per contract" is very easily explicable in this way, that not having a copy of the agreement they could not refer to it with accuracy. They probably had a copy of their letter of the 18th, in which they offered to send from 300 to 400 tons, and they may very well have conceived that the quantity stated in the agreement was 300 tons instead of 350. But how they came to refer in their letter to a "contract," when, as they now say, contract there was none, is a much more difficult question to answer, and it is one with which Mr. Herschell, notwithstanding all the ability he has displayed in the case, has been unable to grapple.

My Lords, I will not go through the whole of these transactions. If you ask me, when in my judgment the agreement was complete, I answer that the agreement was complete when the first coals, the 300 tons of coal supplied in January, were invoiced at the differing price, and when that differing price was accepted and paid. I think that did bring the case up to what Mr. Herschell very fairly admitted, as he was bound to admit it, would be a sufficient case to make out on the part of the plaintiffs. It does establish a course of action on the part of the plaintiffs of such a character as necessarily to lead to the inference on the part of the defendants that the agreement had been accepted on the part of the plaintiffs, and was to be acted upon by them; and they did act upon it accordingly.

*I think, my Lords, it is not necessary for me to [687 go into more detail. I confess that there is no part of the correspondence throughout, that at all shakes the view I entertain in this case as derived from the documents which I

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have already referred to, and I am therefore of opinion that the plaintiffs are entitled to succeed in the action, and that the appeal should be dismissed with costs.

LORD SELBORNE: My Lords, the question which is brought before your Lordships in this case is entirely one of fact, namely, whether the dealings between these parties in the year 1872 were upon the footing of the draft contract signed by Mr. Alexander Brogden in December, 1871. Now, my Lords, the material facts which introduce the dealings are simply these: There having been dealings between these parties going on in the preceding year, the prices increasing, and Mr. Brogden having intimated that he looked forward to a definite arrangement by which some increase of price could be agreed upon, and in the meantime would supply at a lower price, the Messrs. Brogden themselves, in the letter which has been mentioned of the 18th of November, 1871, make a most clear and definite proposal to supply at the price of 20s., which was an increase upon the original price, but less than the price which coal might be expected to reach in the course of the year in a rising market, but to do that only upon the terms of a twelve months' contract, and for a definite quantity. That was an arrangement which had been looked forward to beforehand; it was an arrangement which they themselves proposed; and I must own that I do not follow the passage in the Lord Chief Justice's judgment, in which he says that in November the price of 20s. had been given as that at which the coal owners were willing to supply coal. It is by no means so; they are willing to supply upon a large contract to continue for twelve months, but I can find nothing from which I can infer that, at any time, they would have been willing to supply coal at that price from week to week, or from month to month, or otherwise than upon a twelve months' contract.

That being the Messrs. Brogden's proposal for a contract, 688] the *directors draw up a formal agreement upon the footing of that proposal, but with the addition of at least one very material term, namely, that it shall go on beyond the year unless a certain notice is given to terminate it. They send that to the Brogdens, and Mr. Alexander Brogden makes no alteration whatever in it except by filling up the blanks, the way in which one of those blanks, the blank for the name of the arbitrator, was filled up, being no doubt a matter to which it was necessary that the other party should assent. Then he or his agent, Mr. Hardman, sends it back to the company with the letter of the 21st of December, 1871, signed in a manner which clearly binds them be-

yond all doubt if it was assented to or acted upon on the other side, and adds this, which I think is most material, and really the key almost to everything which follows: "If you have anything farther to communicate, letters addressed to Tondy will find me." That distinctly shows that he thought at all events that it might not be necessary that there should be any farther communication, not that was in his mind that unless he heard anything farther the whole matter was to drop, but that he should take it that silence gave consent. The nature of his alterations was such that he had no reason whatever to expect that there would be, or could be any objection to them, and it was the most natural thing in the world for him to look upon it as uncertain whether any communication would be thought necessary on the part of the company.

Now, my Lords, I by no means say that if nothing had been done upon the footing of the agreement, silence would have given consent in such a sense as to bind the parties on either side. If either Lord Coleridge or Mr. Justice Brett intended to express an opinion that a mere mental consent given under those circumstances, and followed up neither by communication nor by action, would make a binding contract, I should certainly hesitate very much before I assented to that proposition. I do not know that it is necessary so to understand their expressions. No doubt their Lordships did say that mental consent without communication or intimation might do, but then probably their Lordships did not intend to leave out of sight action following upon that assent and consistent with it.

However that may be, this sentence is most material to the *interpretation of what follows. The one party [689 writes to the other in terms which I interpret to mean this; I do not suppose you will have anything farther to say, or that you will make any objection to the way in which I have filled up these blanks, but, if you have anything farther to say, let me hear from you. Now what follows? On the very next day, the 22d of December, not indeed mentioning this contract, but dealing with the subject-matter of it, Burnett writes and says, "We shall require 250 tons" (that is the quantity which we shall want supplied) "per week of locomotive coal, commencing not later than the 1st of January next," that was the very day on which the agreement was to take effect. I can hardly present to my mind the point of view from which any person can refuse to connect the letter of the 22d of December with the letter of the 21st of December, which said, "if you have anything

farther to communicate." The company's agent had this to communicate—the quantity we shall want is 250 tons per week, and we shall want that supply to commence as early as the 1st of January, the day mentioned in the agreement. To my mind that is a clear reference to the agreement which had been drafted, although the agreement itself is not mentioned.

Then, my Lords, all that follows, the immediate requirement on the very same day to supply that quantity from the 1st of January, the action (which I see no reason for referring to any other period) of stopping the supply they had been receiving of fuel from the north on the faith of this agreement upon which they can rely, the quantity originally less but soon raised to the maximum of 350 tons a week, and spoken of in many letters as "the full weekly quantity of 350 tons," and finally so spoken of in the following terms, in a letter of the Messrs. Brogden themselves, "We hope to be able to deliver your full quantity," and the price charged being the same as that mentioned in the contract—it appears to me that every single circumstance points quite unequivocally to this agreement; and, looking at the order of events with regard to the dates and the communications between the parties, I should have thought it absolutely impossible for any person to doubt that, if the directors, after getting the benefit of the lower price for nearly an entire year, had afterwards endeavored to turn [690] round because the price might have risen in *the market, they would have been turned without much hesitation out of any court into which they had come.

Now it is said that Messrs. Brogden could not have understood it so; because they did not give the notice which they might have given at the beginning of November. My Lords, I think there is an extremely simple and easy explanation of that as well as of their letter of the 25th of July, in which they speak of a "contract," although showing some error as to its terms, and also of the peculiar terms of that letter of the 7th of November, written immediately after the dispute had arisen, in which they say that if the agreement is exchanged they will go on to the end of the year, but they will not go on any longer without new terms being settled. The explanation of the whole to my mind is this,—they had not kept a copy of the agreement which Mr. Alexander Brogden had signed;—they had kept a copy of their own letter of the 18th of November, containing their proposal in which there was no provision for carrying on the contract beyond the end of the year, unless notice were given, and

of course nothing whatever as to the time at which such notice was to be given. They had been acting under the impression that the actual contract was on the footing of that letter, probably thinking that the less number of tons mentioned there, namely 300, had been settled instead of the greater 400, which would explain the calculations in the letter of the 25th of July. They had been acting throughout upon the footing not that there was no contract, but that the contract was in that respect different in its terms from what it actually was, and when they found that they had made that mistake, they tried to get out of the contract altogether.

That my Lords is the clear conclusion to which if I was a jurymen sitting upon this case, I should come upon the case, which entirely rests upon fact. I therefore entirely concur in the motion which has been made to your Lordships by my noble and learned friend on the woolsack.

LORD BLACKBURN: My Lords, in this case the question which has now to be decided is, I believe, quite a question of fact; but part of what was said *in the Court of [69] Common Pleas would raise an important question of law, if it were to be taken in a way in which it was not necessary for either Lord Coleridge or Mr. Justice Brett to hold it, and in which therefore they both said, looking to the facts which had been found, they did not hold it. I wish to say upon that point that I cannot agree with what seems to be their view. Mr. Justice Brett, referring to the case of *Ex parte Harris* (') before the Lords Justices, and other cases, says that, looking to all this, he has come "to a strong opinion that the moment one party has made a proposition of terms to another, and it can be shown by sufficient evidence that that other has accepted those terms in his own mind, then the contract is made, before that acceptance is intimated to the proposer." And he goes on to say, applying that to the present case, that, to his mind, as soon as Burnett put the letter into his drawer, a contract was made, although none was formally entered into.

My Lords, I must say that that is contrary to what my impression is, and that I cannot agree in it. If the law was as intimated by Mr. Justice Brett, there would be nothing to discuss in the present case. But I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound.

(') *In re Imperial Land Company of Marseilles*, Law Rep., 7 Ch. Ap., 587.

If a man sent an offer abroad saying; I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the orderer. So again, where, as in the case of *Ex parte Harris* ⁽¹⁾, a person writes a letter and says, I offer to take an allotment of shares, and he expressly or impliedly says, If you agree with me send an answer by the post, there as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound, I agree the contract is perfectly plain and clear.

692] *But when you come to the general proposition which Mr. Justice Brett seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that. It appears from the Year Books that as long ago as the time of Edward IV ⁽²⁾, Chief Justice Brian decided this very point. The plea of the defendant in that case justified the seizing of some growing crops because he said the plaintiff had offered him to go and look at them, and if he liked them, and would give 2s. 6d. for them, he might take them; that was the justification. That case is referred to in a book which I published a good many years ago, Blackburn on Contracts of Sale ⁽³⁾, and is there translated. Brian gives a very elaborate judgment, explaining the law of the unpaid vendor's lien, as early as that time, exactly as the law now stands, and he consequently says: "This plea is clearly bad, as you have not shown the payment or the tender of the money;" but he goes farther, and says (I am quoting from memory, but I think I am quoting correctly), "moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them you signified it to the plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is; but I grant you this, that if in his offer to you he had said, Go and look at them, and if you are pleased with them signify it to such and such a man, and if you had

⁽¹⁾ *In re Imperial Land Company of Marseilles*, Law Rep., 7 Ch. Ap., 587.

⁽²⁾ 17 Edw. IV, T. Pasch's Case, 2.
⁽³⁾ Page 190 *et seq.*

signified it to such and such a man, your plea would have been good, because that was a matter of fact." I take it, my Lords, that that, which was said 300 years ago and more, is the law to this day, and it is quite what Lord Justice Mellish in *Ex parte Harris* ⁽¹⁾ accurately says, that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted. You are bound from the moment you post the letter, not, as it is put here, from the moment you make up your mind on the subject.

But my Lords, while, as I say, this is so upon the question of *law, it is still necessary to consider this case [693 farther upon the question of fact. I agree, and I think every judge who has considered the case does agree, certainly Lord Chief Justice Cockburn does, that though the parties may have gone no farther than an offer on the one side, saying, Here is the draft,—(for that I think is really what this case comes to),—and the draft so offered by the one side is approved by the other, everything being agreed to except the name of the arbitrator, which the one side has filled in and the other has not yet assented to, if both parties have acted upon that draft and treated it as binding, they will be bound by it. When they had come so near as I have said; still it remained to execute formal agreements, and the parties evidently contemplated that they were to exchange agreements, so that each side should be perfectly safe and secure, knowing that the other side was bound. But, although that was what each party contemplated, still I agree (I think the Lord Chief Justice Cockburn states it clearly enough), "that if a draft having been prepared and agreed upon as the basis of a deed or contract to be executed between two parties, the parties, without waiting for the execution of the more formal instrument, proceed to act upon the draft, and treat it as binding upon them, both parties will be bound by it. But it must be clear that the parties have both waived the execution of the formal instrument and have agreed expressly, or as shown by their conduct, to act on the informal one." I think that is quite right, and I agree with the way in which Mr. Herschell in his argument stated it, very truly and fairly. If the parties have by their conduct said, that they act upon the draft which has been approved of by Mr. Brogden, and which if not quite approved of by the railway company, has been exceedingly near it, if they indicate by their conduct that they accept it, the contract is binding.

(1) Law Rep., 7 Ch. Ap., 598.

But then, my Lords, I think Mr. Herschell was justified in what he said, that the *onus probandi* lay upon the railway company who were asserting that, and that it was a question whether enough was done to show that it must be taken that the two parties did agree. Upon that I had on the former argument come to the conclusion, agreeing there with Lord Chief Justice Cockburn, that there was not enough 694] here to show that the *onus* was satisfied, and *that the acting upon the draft was completely made out. I have heard the argument of Mr. Herschell again to-day, and every word that could be said upon the subject in support of that view was, I am quite confident, said by him. Notwithstanding that argument, the majority of your Lordships think otherwise. I think, as indeed I thought before, that there is *some* evidence here that the parties had so treated the draft agreement. I do not think it can be said to be conclusive evidence, but it is evidence on the question of fact to justify the conclusion to which the majority of your Lordships have come. But after listening to what has been said, and farther considering it, I can only say that I hesitate whether I should agree in the verdict or not. I do not say that I dissent from it, I only say that I hesitate about it.

Now, my Lords, I will say very briefly what I have to say upon this subject, just to indicate where it is that I have my doubt. I think that when the draft was sent in that letter there had been considerable delay. They had begun to talk about making this contract in October. The appellants wrote making an offer in November; they had an interview on the 18th of December, and they had run it on until the 22d of December, when Mr. Hardman writes: "Herewith I beg to return you draft of proposed agreement, *re* new contract for coal which Mr. Brogden has approved," according to grammatical construction that means "which draft he has approved." Then it goes on: "I am obliged to leave town for Bristol to-night, and shall be up again on Monday week" (that is, the first of January). "If you have anything farther to communicate, letters addressed to Tondn will find me." Now, upon that, viewing it there, I certainly think it was contemplated that there might be something more to be communicated, there might be indeed need to be something more communicated as to whether they agreed upon the arbitrator or not; but I think that might be communicated without any express words doing it, if the parties showed that they were willing to go on upon those terms.

The next letter that passes is this—I pass by the telegram

—Mr. Burnett writes, “I am in receipt of your letter of yesterday, informing me of your having been obliged to go to Bristol, and thereby prevented calling, as expected, to see me regarding the *supply of coal. As the matter is [695 pressing” (it must be remembered that the 1st of January was fast approaching), “and as you will not be in town again until Monday week, I have just telegraphed to you as follows: ‘We shall require 250 tons per week of locomotive coal, commencing not later than 1st of January next. Reply by wire, that you will do this, that we may arrange with other collieries accordingly;’ as it is necessary for us to know definitely what you can do for us in the way of locomotive fuel, so that we may arrange with other parties who are supplying us at present. The supply of your coal seems to be very irregular at present.” Now, as regards that letter, the impression on my mind is, that if it stood alone it would fairly admit of this construction, I, the writer, Mr. Burnett, am not prepared to say whether my directors will enter into the contract or not. I have put aside the agreement to consider about it, but, as unfortunately you are out of the way, and the 1st of January is fast coming, I telegraph to you and ask you, can you supply us with 250 tons of coal per week from that time forward, pending the time which we have taken to consider. If that were so, clearly that would not have bound the contract.

But, then, comes a thing which does make strong evidence, and which, I think, the noble and learned Lord who spoke first on the other side of the House (Lord Hatherley) has placed his reliance mostly upon, which is this: After he had written that letter there comes, on the 2d of January, again a letter complaining of short supplies, which must of course have meant short supplies prior to the 1st of January, but going on: “I would remind you that it was on your assurance that your firm could send us a regular weekly supply of 250 tons that I stopped our supply of fuel from the north.” And in a letter to the principals at the same time, he says: “I now remind you that we stopped the supply of coke from the north on your Mr. Hardman’s assurance that you would be able to send us a regular supply of 250 tons per week.” I thought, at first, that the Lord Chief Justice’s explanation of that letter was the right one, and that when he said, “Upon your assurance you would be able to send us a regular supply of 250 tons per week” “we stopped the supply of coke from the *north,” that necessarily pointed back to the time [696 when the strike ceased; but I am not by any means certain

now that that is right. I think it is very possible that they might have been getting a supply of coke as fuel from the north, and what is meant here is, that it was in reliance upon the statement in your telegram, in which you told us you would supply us with 250 tons per week, that we stopped the supply of coke from the north. That is an observation not without weight.

It is true that that letter was not written as to a person who had a contract,—Remember you have bound yourself to give me 250 tons a week, and I hold you to your engagement. It is rather a complaint; it is put in this way: Recollect that you said you would give us that supply. It is, therefore, more a kind of letter which I might call a neutral letter, pointing not very distinctly to either one view or the other.

But then, my Lords, comes this fact: after that letter there is a supply all through the month of January of a considerable quantity, and all of that coal is invoiced and paid for according to the contract price of 20s., which was higher than the price had been before. That was evidence, and strong evidence, that the parties had entered into a new contract; that both of them meant to enter into a new contract, I think, cannot admit of any doubt. It is upon that that Lord Justice Bramwell almost entirely bases his judgment. I do not, myself, feel that it is quite so strong as he does. It is, to my mind, evidence, and strong evidence, that they were agreeing. Viewing it as a question of fact, if a jury were to take that view, and were to find that that would be enough to bind the contract, I could by no means say that they were not right. My own view is, that I hesitate a good deal as to whether there is enough to satisfy the *onus* which is cast on the Metropolitan Railway Company to establish a contract; but farther than that hesitation I will not go.

I will not detain your Lordships any longer by remarking upon the other portions of the case. Some of the letters read one way and some the other. I can only say that apart from that change in the price I should have thought that they could all be explained consistently with saying that 697] the bargain was not made; but this *is a piece of evidence, and a strong piece of evidence, bearing upon that. It is a question of fact, and I think there is no doubt at all that if the evidence of fact is sufficient, there is quite enough to bind the contract.

LORD GORDON: My Lords, the case has been so fully discussed by the noble and learned Lords who have addressed your Lordships that I think it would be unbecoming

in me at this late hour of the day to trespass upon your Lordships' time longer, except to express my hearty concurrence in the views which have been stated by the Lord Chancellor, and to say that, as a jurymen, I have no doubt whatever in coming to the conclusion that the judgment ought to be in favor of the respondents, the railway company.

There is no question of law involved in the case except the one which has been referred to by Lord Chief Justice Coleridge and Lord Justice Brett, and I quite concur in the observations which have been made by my noble and learned friends opposite (Lord Selborne and Lord Blackburn) deprecating the views which they expressed with reference to the possibility of a mental assent, as it has been called. In this case we have no evidence whatever of consent by putting the document into a drawer, an operation of the meaning of which we really know nothing whatever. We have no evidence with regard to the character of the documents which are kept in that drawer. I think in this case your Lordships can have no hesitation in coming to the conclusion which has been expressed by the majority of the learned judges throughout. The only difficulty I felt was when reading the very elaborate and able judgment of the Lord Chief Justice in favor of the appellants. I thought that great weight was due to anything coming from that quarter, and he had grappled with all the facts of the case, as I thought. But I find that he relied very much upon a letter written by the solicitors for the appellants, stating that there had been repeated remonstrances or applications made to the solicitors for the railway company for some evidence of acceptance of the contract; but in reality that statement of the solicitors was unsupported by evidence. When that is removed there really is no circumstance which can be taken as justifying *the strong view which the Lord Chief [698 Justice expressed in favor of the appellants.

I therefore think that the judgment should be in favor of the respondents.

Judgment complained of affirmed, and appeal dismissed with costs.

Lords' Journals, July 16, 1877.

Solicitors for the appellant: *Tahourdins & Hargreaves.*

Solicitors for the respondents: *Burchells.*

See 2 Eng. Rep., 315 note; 12 Eng. Rep., 217 note; 17 Eng. R., 797 note.

The offering by one of the canal commissioners, at a meeting of the canal

board, of a resolution in writing, that an appeal be reheard, is an application in writing for such rehearing: *People v. Gardner*, 24 N. Y., 583.

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An entry in its book of minutes of a resolution passed by the governing or legislative body of a municipal corporation, expressing the terms of a contract within its power to make on behalf of the corporation, and the signature of the clerk of said body at the end of the day's minutes containing such resolution, constitute a note or memorandum in writing, signed by the party to be charged, within the meaning of the statute of frauds, sufficient to take the case out of the operation of that statute, and to bind the corporation, where the contract by its terms is not to be performed within a year: *Argus Co. v. Albany*, 55 N. Y., 495; *Hersee v. Buffalo*, 1 Buffalo Superior Ct. Rep., 445; *Commonwealth v. Collins*, 12 Bush (Ky.), 386.

Statements of individual directors out of session, and not accompanying any official act, and statements made by them in debate while in session, are not competent to prove a completed contract between their corporation and an individual for the sale of stock by the latter to the former.

The adoption by the board of directors of a resolution that the corporation do purchase of an individual whatever stock the latter holds, at what it had cost him, which does not fix the price, or the time or manner of payment, without any further action or dealing with such individual on the footing of a trade, does not constitute such an overture for a purchase as will authorize the proposed vendor, upon a tender of his stock to the corporation, to recover the price as on a completed sale: *Peek v. Detroit, etc.*, 29 Mich., 313.

In pursuance of a verbal agreement for the sale of lands, the purchase-money being payable by instalments, to be secured by mortgage on the premises bargained for and other lands owned by the purchaser; a deed and mortgage were drawn up, which were signed and sealed by the vendor and mortgagor respectively, neither instrument referring to the other, and the deed expressing that the purchase-money had been paid. The vendor and mortgagor took away the respective instruments signed by them for the purpose, as alleged, of procuring the execution thereof by their respective wives. The vendor subsequently re-

fused to perfect the transaction, and on a bill filed by the purchaser for specific performance:

Held, that the conveyance so executed by the vendor was sufficient contract of sale within the statute of frauds; that the presumption on the face of such instrument was that the purchase-money had been paid; which being admitted by the plaintiff to be incorrect, the purchaser was entitled to a decree for specific performance, paying the price in hand: *Gillatley v. White*, 18 Grant (U.C.) Chy., 1.

In pursuance of an oral agreement for the sale of land to him by T., C. paid a small part of the purchase-money, and T. executed a deed of the land running to C. (in which the consideration was simply stated to be \$8,100), and delivered to H., with directions to deliver it to C. if the latter should, on the second day thereafter, deposit with H. his two notes for a certain sum, secured by mortgage, and pay to H., for T.'s use, the balance of the price. Within the time limited, C. offered to H. said notes, mortgage, and money; but H., by T.'s direction, refused to deliver to C. the deed, and T. at the same time tendered back to C. the money already paid, and left it with H. for C. upon the latter's refusal to accept it. In an action by C. against T. and H. to compel a delivery of the deed to him: Held, that as there was no execution or deposit with H. of the mortgage from C. contemporaneously with the execution and deposit of T.'s deed, and as the latter deed does not contain the whole contract alleged and relied upon by the plaintiff, there was no valid contract, and the deed was not an escrow: *Campbell v. Thomas*, 42 Wisc., 437.

If two persons enter into a verbal agreement about a matter as to which an enforceable parol contract can be made, it would be no defence when one of them is sued for a breach of the contract that he understood it would not be obligatory unless reduced to writing.

Nor does a contemporaneous agreement to reduce a contract to writing make its validity depend upon its being actually reduced to writing and signed.

An agreement to reduce a contract to writing is merely an agreement to pro-

vide a particular kind of evidence of the terms of the contract: *Bell v. Offut*, 10 Bush (Ky.), 632.

Whether an instrument shall be a lease, or only an agreement for a lease, depends on the intention of the parties, as it is to be collected from the instrument.

Strong circumstances of inconvenience, apparent on the instrument, if it should be construed as a lease, indicate the intention of the parties that it should be an agreement only: *Morgan v. Bissell*, 3 Taunt., 65; 1 Chitty on Cont. (11th Am. ed.), 440-445.

In ejectment the plaintiff claimed as having been turned out of his possession by defendant, without color of right. The defendant claimed under the Grand River Navigation Co., but at the trial he showed no title.

As to a portion of the property, a saw-mill, one B. said that on a Saturday he rented it verbally from the plaintiff for a year, and it was intended to have a written lease, but on Monday the defendant put some one else in possession and refused to let him in; after which he had nothing further to do with it. It was not shown that either the rent or the terms of the tenancy had been agreed upon. Held, not a lease but an agreement only, and that the defendant could not set it up to defeat the plaintiff's title: *Kyle v. Stocks*, 31 U. C. Q. B., 47.

A verbal agreement which is to be put into writing and signed the next day is not complete so as to bind either party until reduced to writing and signed: *Riggs v. Magruder*, 2 Cranch's C. C., 143; *Lee v. Purdy*, 2 U. C. Q. B., 193.

It is essential to the existence of every contract that there should be a reciprocal assent to a definite proposition, and when the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, an assent thereto in any other or different mode will not be presumed.

Where parties enter into an agreement, and the understanding between them is that it is to be reduced to writing, or, if it is already in a form, that it is to be signed before it is acted upon, or is to take effect, it is not binding upon them until it is so written or signed.

In contracts where the promise of the

one party is the consideration for the promise of the other, the promises must be concurrent and obligatory upon both at the same time.

Where the agreement between the parties required the execution of a bond, to be given by one of the parties and signed by two sureties, conditioned for the faithful performance of the contract on his part: Held, that it was essential to the completion of the contract that the bond should be so executed.

To render a proposed contract binding, there must be an accession to its terms by both parties. A mere voluntary compliance with its conditions by one who had not previously assented to it does not render the other liable on it: *Morrill v. Tehama*, etc., 10 Nevada, 125.

Where an insurance policy provides that it shall be void in case of further insurance, unless *written* notice thereof be given to the company and a consent thereto *in writing* indorsed upon the policy, the insurer may waive a compliance with the condition that the notice and the consent shall be *in writing*: *Riddle v. Market*, etc., 29 N. Y., 184; *Pierce v. Nashua*, etc., 50 N. H., 297; *McCabe v. Dutchess*, etc., 14 Hun, 599; *McCabe v. Farm*, etc., 14 Hun, 602.

See *Gilbert v. Phoenix Ins. Co.*, 36 Barb., 372.

The receipt by insurers, through their general agent, of renewal premiums, taken by him with knowledge of other insurance on the same property, is a waiver of the requirement of the policy that formal notice of any such insurance must be given, and an indorsement made on the policy: *Carroll v. Charter Oak Ins. Co.*, 1 Abb. App. Cas., 316, 10 Abb. Pr. Rep., N.S., 166, affirming 38 Barb., 402.

Notwithstanding a provision in the policy that no condition can be waived, except in writing signed by the secretary, a condition may be waived by parol, by the general acting within the scope of his agency, especially where the act can be regarded as ratified by the company: *Carroll v. The Charter Oak Ins. Co.*, 1 Abb. App. Cases, 316, 10 Abb. Pr. Rep., N.S., 166, affirming 38 Barb., 402.

The authorities sustain the general doctrine, that a waiver of a stipulation in a contract may be shown by parol,

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notwithstanding the contract requires a writing: *Carroll v. The Charter Oak Ins. Co.*, 1 Abb. App. Cases, 316, 10 Abb. Pr. Rep., N.S., 166, affirming 38 Barb., 402; *McCabe v. Dutchess, etc.*, 14 Hun, 599; *McCabe v. Farm., etc.*, 14 Hun, 602.

But where a policy of insurance contained a clause of avoidance for additional insurance unless the consent of the company be written on the policy, and the only consent alleged was in a letter of reply written by the agent of the company to the insured saying: "We will, of course, allow other concurrent insurance with the Allemania policy, and will also place you more insurance at same rate that we charged you before, and do it in A 1 company or companies. Trusting to hear from you at your earliest convenience, we remain," etc. Held, not to amount to a consent to any specific additional insurance, nor to meet the requirements of the policy, which became absolutely void at once upon the obtaining of additional insurance without consent: *Allemania, etc., v. Hurd*, 37 Mich., 11.

Where a policy of insurance provides that any other insurance is required to be notified to and approved of by the insurers, a local agent, who is declared by a written appointment to be "regularly appointed an agent and surveyor of the company" and to be "duly authorized to take applications for insurance," has no authority to approve of a subsequent insurance. His authority is limited to that expressly given him by the appointment: *Wilson v. Genesee, etc.*, 14 N. Y., 418.

Defendant being bound by a sealed contract to consign all the goods he manufactured to plaintiffs, they gave him oral permission to consign to other parties, and he acted on the permission. Held, that plaintiffs could not be allowed to recall it or to sue him for a breach of contract: *Hadden v. Dimmick*, 13 Abb., N.S., 136, Ct. Appeals; *Fleming v. Gilbert*, 3 Johns. Chy., 528.

See also, to same effect, *Jackson v. Harrison*, 17 Johns., 66; *Jackson v. Silvernail*, 15 Johns., 278; *Jackson v. Brownson*, 7 Johns., 227; *Bensen v. Juarez*, 28 How. Prac., 511, 43 Barb., 408, 19 Abb. Pr., 61; *Lynde v. Hough*, 27 Barb., 415, 423-4; *Riggs v. Pursell*, 66 N. Y., 200; *Smith & Soden's Land. and Ten.*, 143.

But see *Roe v. Harrison*, 2 Term R., 425; *Braddick v. Thompson*, 8 East, 344; *Jackson v. Chrysler*, 1 Johns. Cas., 125; *Hail v. Frances*, 4 Upp. Can. Com. Pl., 210; *Carter v. Hibblethwaite*, 5 U. C. Com. Pl., 475.

By a verbal agreement between S. and F., it was agreed that S. should subscribe for \$1,000 of the capital stock of a manufacturing corporation, one half of which should belong to each; that S. should hold the same on joint account, and receive the dividends thereon, F. to pay the interest annually on \$500, one half of the amount paid; that when S. should want \$500 he was to notify F., and if F. did not pay, S. should sell the stock, and F. would pay the difference between the sum received on such sale and the par value of the stock. S. accordingly subscribed for \$1,000 of the stock in his own name and paid therefor. It was a part of the bargain that the agreement should be put in writing, but it never was:

Held, that although F. might have insisted on the performance of the condition that the agreement should be reduced to writing, it was competent for him to waive it by recognizing his liability on the contract, although it had never been reduced to writing and signed: *Stover v. Flack*, 30 N. Y., 64.

There may be an effectual waiver, by parol, of a condition specified in a written agreement, as to a provision in a building contract requiring a written memorandum for extra or omitted work: *Smith v. Gugerty*, 4 Barb., 615; *Pierrepoint v. Barnard*, 6 N. Y., 279.

Where a contract for the erection of a building provides that no extras shall be permitted or allowed unless agreed upon in writing, and that the writing should be produced before payment therefor. In an action to recover for extras: Held, that there could be no recovery therefor unless agreed upon in writing and the writing therefor produced: *Oldershaw v. Garner*, 38 U. C. Q. B., 37; *White v. San Rafael, etc.*, 50 Cal., 417.

Even though the contract provide that the engineer may direct alterations in and additions to the work: *White v. San Rafael, etc.*, 50 Cal., 417.

A building contract for the erection of a church according to certain plans and specifications, contained a proviso,

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that if defendant should at any time be desirous of making any alterations or additions in the erection or execution of the church, or other works thereunto appertaining, plaintiff should erect, complete, make and execute the church or other works, with such alterations and additions as defendant or one S. should direct, *by writing, under his or their hand*. Certain extra work was done at the desire of the defendants, though such desire was not expressed in writing under their hand. Held, that plaintiff was entitled to recover for the extra work, for the contract did not provide that no such work was to be allowed or paid for, *unless ordered in writing*, which *would* have prevented the plaintiff's recovering, but merely that plaintiff was *bound* to execute such extra work as defendants or S. should direct in writing to be done: *Diamond v. McAunary*, 16 U. C. Com. Pl., 9.

The plaintiffs agreed in writing to build a house for defendant for \$10,405, two thousand dollars in advance, and the balance at the rate of 85 per cent. for the work fixed in its place, but no payment to be made without a written certificate from the architect; the remaining 15 per cent. to remain in defendant's hands for a month after the completion of the work, and also until all the defects which the architect should within that period certify to exist should be remedied. It was also agreed that no extras should be permitted or allowed unless agreed

upon in writing, and that the writing should be produced before payment therefor. In an action to recover the 15 per cent., and for extras,—

Held, that the certificate as to defects need not be in writing, that not being expressly required; and there being evidence that the architect within the month verbally signified his dissatisfaction with certain specified defects, that the plaintiff could not recover.

Held, also, that there could be no recovery for extras claimed, no writing therefor having been produced.

The defendant having taken possession of the building which was upon his own land; held, that this could not entitle the plaintiffs to recover under the common counts: *Munroe v. Butt*, 8 E. & B., 738, approved and followed; *Oldershaw v. Garner*, 38 U. C. Q. B., 37.

The defendant employed the plaintiffs to construct a house under a building contract, in which it was stipulated that there should be no charge for extra work, unless specially ordered in writing by the architect employed. The defendant himself having requested the plaintiffs to do certain work on the building, and desired the plaintiffs' men to take their orders from him and not from the architect:

Held, that for this work the plaintiffs might recover in an action on the common counts, without reference to the contract: *Melrith v. Carpenter*, 11 U. C. Q. B., 128.

[2 Appeal Cases, 698.]

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HARVEY BATHURST and WILLIAM GEORGE CRAVEN, Appellants; and SIR JOHN ERRINGTON, BART., and Others, Respondents. (¹)

Will—"Become the Eldest Son."

Where the words of a will are unambiguous, they cannot be departed from merely because they lead to consequences capricious or even harsh and unreasonable. But where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result.

The rule stated in *Abbott v. Middleton* (²) adopted.

(¹) Affirming 19 Eng. Rep., 795.

(²) 7 H. L. C., at p. 89.

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A testator, E., devised his estates to R. the second, J. the third, and C. the fourth sons of his brother-in-law Sir T. S. (entirely passing over W., the eldest son), and to their sons successively in tail male. By a name and arms clause he directed that as any one became entitled under the will he should assume the name and arms of E. He then introduced a shifting clause, that in case R., or J., or C. "should become the eldest son" of Sir T. S., the E. estates should go over to the next in remainder under his will. The testator died in 1819. Sir T. S. survived the testator. W., the eldest son, succeeded his father in the S. baronetcy, and in the paternal estates; and disentailed and sold them. On his death without issue R. succeeded to the baronetcy. He had long before complied with the name and arms clause in the testator's will, and was in possession of the E. estates. R. died without male issue, and J., the third son, then claimed the E. estates:

Held, that he was entitled to them, for that upon the true construction of 699] *the will he had not "become the eldest son" of Sir T. S., and the shifting clause had therefore not taken effect.

Per THE LORD CHANCELLOR (Lord Cairns): The eldest son of a man is his first-born—the *primogenitus*; and the words "shall become the eldest son" of a person living at the date of a will cannot, without an explanatory context, be extended beyond the lifetime of that person; they are connected with the heirship of, and right of succession to, a living man.

Per LORD SELBORNE: In order to give a different construction to the will, the word "surviving" would require to be introduced between the word "eldest" and the word "son."

THESE were suits instituted for the purpose of obtaining a decision on the construction of certain clauses in the will of Henry Errington, Esq., of Sandoe, in the county of Northumberland, and of Red Rice, in the county of Hants, who died in the year 1819.

The testator was connected, by the marriage of his two sisters, with the families of Fermor and of Stanley. He gave all his estates in the county of Northumberland to Sir John Throckmorton and Mr. Bernard Edward Howard (afterwards Duke of Norfolk) as trustees to the use of Richard Fermor (the third of the sons of Mrs. Fermor) for life, and to his first and other sons in tail male, remainder (passing over William, the eldest son of Sir Thomas Stanley) to the use of Rowland Stanley, the second son of Sir Thomas Stanley, of Hooton, in the county palatine of Chester, Bart., for life, remainder to trustees to preserve, &c., remainder to the use of the first and other sons of Rowland Stanley successively in tail male, remainder to the use of John Stanley, the third son of Sir Thomas Stanley, for life, remainder to trustees, &c., remainder to the first and other sons of John Stanley successively in tail male, remainder to Charles Stanley, the fourth son of Sir Thomas Stanley, for life, remainder to trustees, &c., remainder to the first and other sons of Charles Stanley successively in tail male, with an ultimate remainder to the testator's right heirs.

The will contained the following clauses: "And I do hereby require and direct that the said Richard Fermor, Row-

land Stanley, John Stanley, Charles Stanley, and every other person who, by virtue of the devise hereinbefore contained, or of this proviso, shall become entitled to the possession or to the receipt of the rents and profits of the estates hereby devised, shall and do, within the space of one year next after they shall respectively so become entitled to the possession, or to the rents and profits of the said estates, take *upon him and them respectively, and use in all [700 deeds, letters, and writings, the surname of Errington only, and no other surname, and take and bear the arms of Errington only, and no other arms, and shall and do within the space of one year next after they shall so respectively become entitled as aforesaid sue for and apply and endeavor to obtain" an act of Parliament for these purposes. And "in case any such person or persons shall refuse or neglect to take such surname and arms," and to use the means requisite to enable him to do so, "the devise hereinbefore contained to the use of him or them so neglecting or refusing shall cease, determine, and become utterly void." And the said estates were, in such cases, immediately to go to the persons next beneficially entitled "in remainder under the devises hereinbefore contained" as if the persons whose estates should so cease had died without issue male.

Then came the following shifting clause, on which the question of construction was raised: "And I do hereby declare it to be my will that in case the said Rowland Stanley, or John Stanley, or Charles Stanley shall become the eldest son of the said Sir Thomas Stanley, then and in such case, and so often as the same shall happen, the estates hereinbefore devised to him so becoming the eldest son of the said Sir Thomas Stanley, and the remainder to the first and other sons of his body, shall cease, determine, and become void, as if he were actually dead without issue male of his body, and then and thenceforth the estates hereby devised shall immediately go and remain to the use of such person or persons as, by virtue of the devises hereinbefore contained, would then be entitled as the person or persons next in remainder to the same estates in case such person so becoming the eldest son of the said Sir Thomas Stanley was then dead without issue male of his or their body or bodies, and the same person or persons shall in every such case be entitled to take the same estate and estates in the said premises hereby devised as he or they would have been entitled to take therein by virtue of this my will if such person so becoming the eldest son of the said Sir Thomas Stanley were actually dead without issue male as aforesaid."

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The residuary personal estate was given for the purchase of other real estate to be settled to the uses of the will expressed as *to the existing estates. William Cruise and William Throckmorton, of Lincoln's Inn, Esquires, were appointed executors.

Mr. Fermor died in the lifetime of the testator, without issue. The testator died in 1819, and Rowland Stanley became entitled on his death to the Errington estates. Sir Thomas Stanley, his first-born son William Thomas Massey Stanley, Rowland the second, John the third, and Charles the fourth sons, as named in the will, survived the testator. Rowland was then about ten years of age, and from that time was known as Rowland Errington.

In the year 1820 the royal permission was obtained for Rowland to bear the name and arms of Errington only, and he entered into possession of the Errington estates. The personal estate of the testator, amounting to above £144,000 was, under the direction in the will, invested in the purchase of real estate to be settled as above described.

Charles Stanley, the youngest of the brothers, died in 1834 without issue.

Sir Thomas Stanley died in August, 1841, leaving William T. S. M. Stanley his first-born son, Rowland his second, and John his third son him surviving. William succeeded his father in the Stanley baronetcy and the Stanley estates, disentailed them, acquired complete dominion over them, and sold them, and applied the proceeds of the sale to his own purposes. He died in June, 1863, without having been married. Rowland Errington then succeeded to the Stanley title, and continued in possession of the Errington estates until his death in 1875. He died without male issue. John then succeeded to the Stanley baronetcy.

In June, 1875, bills were filed on behalf of the persons claiming as right heirs of the testator, praying that it might be declared that in the events which had happened they were entitled to the possession of the Errington estates under the testator's will. Answers were put in, and the causes were heard in the Chancery Division by the Master of the Rolls, who, on the 13th of March, 1876, pronounced judgment to the effect that Rowland, on the death of his elder brother Sir William, became the eldest son of Sir Thomas Stanley, that thereupon John became by virtue of the limitations entitled to the Errington estates for life subject to the provisions of the name and arms clause; that his 702] estate *determined at the end of a year in consequence of his not having complied with those provisions,

and that thereupon the estates went over to the right heirs of the testator; that on the death of Rowland, John became, according to the true construction of the shifting clause, the eldest son of Sir Thomas Stanley, and that thereupon the right heirs became indefeasibly entitled in possession to the Errington estates.

In March, 1876, John, by deed (not having obtained either an act of Parliament or the license of the Crown authorizing him to do so) assumed the name and arms of Errington only, and has since been so styled and designated.

Sir John Errington appealed against the decree of the Master of the Rolls, and the Court of Appeal (consisting of Lord Justice James, Lord Justice of Appeal Baggallay, and Lord Justice of Appeal Bramwell, who dissented) reversed ⁽¹⁾ the decree of the Master of the Rolls. This appeal was then brought.

Mr. *Chitty*, Q.C., and Mr. *Badnall*, were for the appellant Craven.

Mr. *Southgate*, Q.C., and Mr. *Bagot*, for the appellant, Harvey Bathurst.

Mr. *Benjamin*, Q.C., Mr. *Kekewich*, Q.C., and Mr. *Wolstenholme*, for Sir John Errington.

• Mr. *Davey*, Q.C., Mr. *Bagshawe*, Q.C., and Mr. *Smart*, for the trustees under the will.

Mr. *Chitty*, Q.C., and Mr. *Southgate*, Q.C.: The question here really depends on the construction to be put on the shifting clause, but the name and arms clause will much aid the House in arriving at the proper construction. Now upon the name and arms clause it cannot be doubted that the Errington estates, which would have come to John when his elder brother Rowland succeeded to the Stanley title and estates, and so became disabled to hold the Errington estates, were forfeited by him through his neglect to take the name and arms of Errington. The clause distinctly inflicted the penalty of forfeiture for such neglect.

The appellants were the right heirs of the testator, and as such *became entitled to the estates devised by his [703 will, all the events having happened which determined the particular estates of all the previous takers. The words of the will must be read in the ordinary sense as written: *Grey v. Pearson* ⁽²⁾. That rule had been previously declared in *Scarborough v. Savile* ⁽³⁾; and the construction of a shifting clause does not form an exception to it. So read, it was clear that John Stanley, now calling himself Errington, had,

⁽¹⁾ 4 Ch. D., 251, *nom. Bathurst v. Stanley*, and *Craven v. Stanley*.

⁽²⁾ 6 H. L. C., 61.

⁽³⁾ 3 Ad. & E., 897-962.

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by the deaths of his elder brothers without male issue, "become the eldest son" of Sir Thomas Stanley, and as such was entitled, and had succeeded to his father's baronetcy, and was, so far as the words of family settlements provided, entitled to the Stanley estates. The will of Mr. Errington, the testator, therefore expressly excluded him from the enjoyment of the Errington estates. The observation in the court below, that there could not be "an eldest son" unless he had younger brothers, was a simple mistake. It was contradicted by the case of *Tuite v. Bermingham* (1), where an only son was treated as the eldest son, and so the estates went from him, who, as an "eldest son," was excluded from their enjoyment, and they passed over to the devisees in remainder. *Harrison v. Round* (2) exactly supported this contention. The words there were should "become an eldest son," and the second-born son was held upon the death of his elder brother to have come within the operation of those words, and Lord Chancellor St. Leonards, though giving such effect to the words would be to defeat a vested estate, acted upon them, because, as he said (3), "the party who creates the estate has also a right to limit it over or to defeat it." The principle was acted upon in the case of *Biddulph v. Lees* (4). It may be admitted that the burden of showing that this is the proper construction of the will lies on the appellants, but that is a burden which, on the authorities applicable to this case, is easily discharged.

The rule that, when portions are to be divided, from the benefit of participating in which an eldest son is excluded, as in *Collingwood v. Stanhope* (5), the time for ascertaining 704] who fills the *character of eldest son is the period fixed for the distribution of the fund, does not affect the present case, for there only one period of time can be referred to, while here the will refers to several periods, and declares what is the intention of the testator when and "so often" as the event he has provided for shall happen; and in *Collingwood v. Stanhope* Lord Westbury (6) expressly remarks on the distinction between cases of portions and cases of shifting clauses. The father's death cannot affect the question of a son becoming an eldest son: *Lord Teynham v. Webb* (7). There the father died leaving two sons: the elder died four years after him; the younger became thereby the successor to the Teynham title and estates, and

(1) Law Rep., 7 H. L., 634.

(2) 2 D. M. & G., 190.

(3) 2 D. M. & G., 201.

(4) El. Bl. & El., 289.

(5) Law Rep., 4 H. L., 43.

(6) Law Rep., 4 H. L., 57.

(7) 2 Ves. Sen., 198.

was treated as the eldest son. [LORD SELBORNE: That was the case of a settlement, and the son who was said to become the eldest son was provided for by succeeding to the paternal estates.] That does not create a substantial difference. In *Matthews v. Paul* ⁽¹⁾ the second son who by the death of his elder brother had become the eldest, was held not entitled to a share of the stock given to the younger children, although an estate limited to his elder brother did not descend to him. It is admitted, however, that that is a case of the class of portions cases. And that was the explanation of the decision in *Theed's Trusts* ⁽²⁾. But where all the matters provided for by the will have happened the result directed by the will must follow. That is the case here. In *Meyrick v. Laws* ⁽³⁾ the shifting clause did not take effect, because the events contemplated by the testator had not happened; here they have happened, and happened as he contemplated, and consequently the shifting clause ought to have full effect. There is great danger in introducing into such cases as the present, the consideration whether the settled estates do entirely, or partially, or not at all, come to the possession of the younger son who, by the course of events, has become the eldest son as pointed out by the testator; and in *Livesey v. Livesey* ⁽⁴⁾, though the second son who had become the eldest son did not succeed to the estates which had been provided for his elder *brother, [705 it was held that as by the death of his elder brother he had become the eldest son, he was excluded from the share which otherwise he would have taken in the residue.

Mr. *Benjamin*, Q.C., and Mr. *Kekewich*, Q.C.: If the will is construed so as to give effect to the real intention of the testator this decree must be affirmed. It may be admitted that he did not desire to see the Stanley estates and the Errington estates united in one person, but he never intended that, in any event which might happen, the person in whom the Errington estates had become vested should be divested of them merely because he might succeed to the Stanley baronetcy, although he did not succeed to the Stanley estates. He speaks only of becoming the eldest son, which must have reference to the estates that the eldest son would be expected to possess. Although in terms he does not mention those Stanley estates he must have meant to refer to them. His real desire was to found an Errington family, not to have the Errington estates so divided that no such family could be founded. The contention on the other

⁽¹⁾ 3 Sw., 328; 2 Wils., 64.

⁽²⁾ 3 K. & J., 375; 26 L. J. (Ch.), 514.

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⁽³⁾ Law Rep., 9 Ch. Ap., 287.

⁽⁴⁾ 2 H. L. C., 419.

side, if successful, would have this effect, that a person might have taken the Errington estates, assumed the name and arms of Errington, and then merely because he became entitled to the title of the baronetcy of Stanley, the Errington estates should go from him and pass to strangers. This could never have been intended, and to give such an effect to the will would really be to defeat the intention of the testator, who never could have meant that such a strange result should take place.

A man cannot become the eldest son of his father many years after his father's death. He may be said under certain circumstances, and in certain respects, to have come into the position of his eldest brother, but he has not become the eldest son, and he cannot even be said to have come into the position of the eldest son unless he succeeds to all the advantages which that eldest son possessed. As is pointed out by Lord Cairns in *Collingwood v. Stanhope* ⁽¹⁾, the one child who takes the bulk of the estate is he alone who is prevented from participating in the general provision made for the benefit of children. That principle, as his 706] *Lordship remarked, had been acted upon so long ago as in *Duke v. Doidge* ⁽²⁾. The case of *Matthews v. Paul* ⁽³⁾ did not contradict that principle. It was the status of the person which was to be considered, and no one could say that Sir John Errington here had succeeded to the status of his eldest brother, for that brother had held the Stanley family estates, which alone the testator had desired to disconnect from the Errington estates, but the respondent here had no connection with the Stanley estates, but was in the position in which the testator had desired him to be for the purpose of founding an Errington family.

Mr. Chitty replied.

THE LORD CHANCELLOR (Lord Cairns): In construing the will of the testator, Henry Errington, which was made so long ago as 1814, devising property of considerable value, which I will afterwards call the Errington estates, it is necessary that we should put ourselves, as far as we can, in the position of the testator, and interpret his expressions as to persons and things with reference to that degree of knowledge of those persons and things which, so far as we can discover, the testator possessed. He was at the time a childless man of upwards of seventy years of age. His eldest brother was also childless. He had had a sister, Mrs. Fermor, who had left several sons alive, and of full age at

⁽¹⁾ Law Rep., 4 H. L., 43, 61, 63.

⁽²⁾ 2 Ves. Sen., 203, n.

⁽³⁾ 3 Sw., 328; 2 Wils., 64.

the date of the will. His grand-niece, the granddaughter of another sister, had, about nine years before the date of the will, married Sir Thomas Massey Stanley, of Hooton, and had at the date of the will four sons, William, Rowland, John and Charles, aged respectively seven years, five, four, and one. The state of the family of his grand-niece must have been well known to the testator, for he mentions correctly the names and the order of the birth of her second, and of her younger sons, infants as they were. The Stanley baronetcy was an old one, Sir Thomas Stanley being the ninth baronet; and the testator describes him by full and apposite words, and connects the name with the family estate of Hooton, in the county palatine of Chester. There is no distinct evidence, *on the face of the will or [707 otherwise, that the testator knew the value of the Hooton property, or the specific manner in which it was entailed; but it is impossible not to be convinced that the testator who knew so much about the family of Sir Thomas and Lady Stanley, knew also that which was almost a matter of common knowledge, that the baronetcy had descended and was then connected with the enjoyment of a family estate of considerable value.

Under these circumstances the testator made his will. He does not provide for all the children or all the sons of his sister, Mrs. Fermor, or for all the children or all the sons of his grand-niece, Lady Stanley. He singles out one of the Fermors as the only object of his bounty; and he passes over the eldest son of Lady Stanley, and takes no notice of what was, at the time, a high probability, that she would have sons thereafter born. He devises his estates to Richard Fermor, the third of the Fermor sons, for his life, with remainder to his first and other sons in tail; and for default of such issue to Rowland Stanley, the second son of Sir Thomas Stanley for his life, with remainder to his first and other sons in tail; with remainder to John Stanley, the third son for life, and to his first and other sons in tail; with remainder to Charles Stanley, the fourth son for life, with remainder to his first and other sons in tail, with remainder to his own right heirs forever.

He then provides that in case Rowland, or John, or Charles should "become eldest son of Sir Thomas," then, and in such case, and so often as the same should happen, the estates devised to him so becoming the eldest son of Sir Thomas, and the remainder to the first and other sons of his body, should cease, determine, and become void as if he were actually dead, without issue male of his body, and that

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then and thenceforth the devised estates should immediately go and remain to the use of such persons as by virtue of the devises thereinbefore contained would then be entitled as the persons next in remainder to the same estates, in case such person so becoming the eldest son of Sir Thomas Stanley was then dead without issue male of his body.

It is to the meaning of this clause that the question has arisen.

The testator died in 1819. Richard Fermor died a bachelor *in the testator's lifetime, and therefore, on the death of the testator, Rowland Stanley entered into possession of the Errington estates. Sir Thomas Stanley died next, in 1841, his son Charles having died in his lifetime. Then William, his eldest son, died unmarried in 1863. Then Rowland Stanley died in 1875, and John Stanley (now the respondent Sir John Errington), became the baronet, and the only surviving son of Sir Thomas.

It should be added to what I have already said, that the will contained a name and arms clause requiring every person becoming entitled to the possession of the Errington estates, within one year, to take the name and arms of Errington, and to endeavor to obtain an act of Parliament or license from the Crown to enable him so to do, declaring that if this was not done the devise to him should be utterly void, and the estates go over to the person next beneficially entitled in remainder.

It is contended on behalf of the appellants, that on the death of William, in 1863, Rowland became the eldest son of Sir Thomas, within the meaning of the shifting clause, and that thereupon John became entitled to the possession of the devised estate, but that, as he did not take the name and arms of Errington within a twelve month, his estate ceased; and farther, that on the death of Rowland, in 1875, the respondent, John, became the eldest son of Sir Thomas, within the meaning of the shifting clause, and that thereupon the Errington estates went over to the heirs-at-law, who are the appellants. The respondent, Sir John, on the other hand, contends that Rowland never became, and that he (John) never became the eldest son of Sir Thomas within the meaning of the clause, and that therefore the Errington estates remained vested in Rowland, and on the death of Rowland without issue male, came to the respondent John, and are now vested in him; and he has been, and is now in possession of the estates.

The Master of the Rolls adopted the construction of the shifting clause contended for by the appellants, but his de-

crec was reversed by the Court of Appeal. Lord Justice Bramwell, however, dissenting from the opinion of the majority, which consisted of Lord Justice James and Lord Justice Baggallay, the bills filed by the appellants were, in the Court of Appeal, dismissed with costs, and, in my opinion, that decision ought to be affirmed.

*It is impossible to interpret the shifting clause [709 according to the literal meaning of the words. The eldest son of a man is his first-born, the *primogenitus*; and in this sense, Rowland, John, or Charles, never could become the first-born or *primogenitus*, of Sir Thomas Stanley, for William, as was well known to the testator, was in this sense his eldest or first-born son. Hence the appellants are therefore obliged at the outset to admit that, according to their construction, they must insert the word "surviving" after the word "eldest," and must read the clause as if it ran, "In case Rowland, John, or Charles, shall become the eldest *surviving* son of Sir Thomas." It is possible that, with a context harmonizing with this construction, the words "eldest son" may have this meaning; but it is obvious that where they have this meaning the word "eldest" does not describe the status of the son, with reference to his father, so much as it does his status with reference to his brothers, and the expression is, in fact, the same as if it ran, "the eldest of the surviving sons of Sir Thomas." The respondent contends that the words "become the eldest son of Sir Thomas," indicate a son who should become what William was at the date of the will, that is to say, an eldest son, who was also heir apparent of a living father, and there is no doubt that, if the context harmonizes with this idea, the words used are capable of this construction also.

It being, then, impossible to read the words, "the eldest son," according to their primary and literal meaning, and the words "become the eldest son" being ambiguous and capable of two significations, upon what principle is the court to determine which of the two ambiguous significations is to be adopted?

The rule upon this subject was happily expressed by Lord Cranworth, in the case of *Abbott v. Middleton* ⁽¹⁾ in this House, in words which have been more than once referred to: "Where by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions,

⁽¹⁾ 7 H. L. C., at p. 89.

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we may reasonably and properly adopt that which avoids 710] these anomalies, even though the *construction adopted is not the most obvious or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable.”

Applying that rule in the case before us, and assuming for the present that the two constructions of the words which I have mentioned are in themselves equally accurate, let us see which of the two constructions will best satisfy the test which Lord Cranworth has thus proposed.

The testator could have had no *personal* motive for preferring the younger sons of his grand-niece to the eldest, or for making their interests cease or determine at any particular time, for they were, as I have said, all of them in their earliest infancy. The exclusion of the eldest and the provision for shifting the estates from time to time, must therefore have been made with reference to the devolution or possession of some other estate or some title. It is on this footing, and in reference to such events, that, so far as we are acquainted with the habits of testators, a shifting clause is, without any instance that I am aware of to the contrary, introduced into wills. The testator had before him the Stanley baronetcy, and some knowledge at all events of the Hooton estate connected with the baronetcy. It appears to me to be not material that he is not shown to have known the particulars of the settlement of the Hooton estate. It may be taken, although it is highly improbable, that he knew no more than the fact that the baronetcy was an ancient one, and that its holder occupied the position of a man of property in his county. He would be content to assume that this would continue to be the case, and that the heir of the baronetcy would need no farther or separate endowment. He might have given his property to William, the eldest son, making it shift if and when he became the baronet; but in place of doing so he appears to assume that William, as the eldest son and heir apparent of his father, will be provided for by his father even in his lifetime; and therefore, passing him over, he appears to assume that any other son becoming in his father's lifetime what William then was will be provided for by his father as William would be provided for. In this way a shifting of the estates will 711] *take place exactly answering to the supposed object, and likely to continue for a considerable time while Sir Thomas lived and the three sons mentioned were growing up.

If, on the other hand, the construction of the appellants is adopted, there is attributed to the testator a scheme of disposition not merely capricious, not merely disastrous to the objects of his bounty, but one which, in the words of Lord Cranworth, is absolutely without any intelligible motive. The estates would shift without any reference to the devolution of the title, or of any property supporting the title. If all the persons were to die according to the order of their ages, events which a testator generally inclines to suppose, the estate would go from son to son, and finally over to the collateral heirs, although all the sons in succession might leave large families of sons and daughters. The Stanley baronetcy and the Hooton estate might have come down from Sir Thomas to William, who might have many sons, to whom they would afterwards descend; and then, William dying, Rowland would, according to the appellants, become the eldest surviving son, and the Errington estates—the only means, it may be, of support of himself and his family—would thereupon go over, leaving him and them absolutely destitute, and that for no reason and on no principle that could be understood or could be even suggested.

Supposing therefore the words to admit of two constructions, equally accurate grammatically, it would be our duty to adopt the construction which would avoid the anomalies to which I have referred, even supposing that construction were not the most obvious one. But I am bound farther to say that I do not think the words “shall become the eldest son” of a person living at the date of the will, are words which, unless controlled and explained by a context, extend in their operation beyond the lifetime of that person. I agree on this point with the general observations of Lord Justice James. I do not think that without an explanatory context explaining and forcing the construction, a man is, by the death of his elder brother, said to become the eldest son of his father after his father’s death. I think the words “become the eldest son,” in their natural and ordinary meaning, point to the attaining a status perfectly well known and *well understood, and connected with heirship [712 of, and right of, succession to a living man.

For these reasons, which have been so fully expounded in the judgments in the Court of Appeal that I do not think it necessary to dwell farther upon them, I submit to your Lordships that these appeals should be dismissed. With regard to the costs, there is no trust to be executed and no direction to be given requiring the intervention of the Chancery Division of the court. The suit is in reality an action by

the persons out of possession against a person in possession, undertaking to show that his possession is wrongful. If they had succeeded, they would have been entitled to succeed with costs, and in like manner failing, I think they must fail with costs to be paid by them.

LORD HATHERLEY: My Lords, I have come to the same conclusion as that which has been expressed by my noble and learned friend on the woolsack.

I think that any one looking to this will must see at once that there were two objects which presented themselves very strongly to the testator's mind. The one, that of either the founding or the continuation of a family of the name of Errington, and the other that that name should, at all events, not be confounded with the name attached to a family holding otherwise considerable possessions, in which also there was a baronetcy connected with the name of Stanley, with which they held those possessions. He was not desirous that the name of Errington should be confounded with that of Stanley, but wished it to be kept clear and distinct throughout.

As regards his first devise of the estates to the third son of his niece, who was named Fermor, we have nothing very definite to show that he desired in any way to alter or limit that gift which he had made to the Fermor family, in any circumstances that might happen in the shape of accretion of estates or property to the Fermors. But even as regarded the Fermor family, he subjected Mr. Fermor, the first taker, to what is usually called the name and arms clause, which required him to assume the name of Errington, so far corresponding with his wish which, as I said *before, evidently was to perpetuate that name in connection with the estates bestowed by his bounty.

Having done that, he proceeds to consider the farther devises in the event of Richard Fermor, the third son of his niece, dying without leaving any issue male; and then he gives the property in this way: "For default of such issue to the use of Rowland Stanley, the second son of Sir Thomas Stanley, of Hooton, in the county palatine of Chester, baronet." In addition to the remarks which have been made by my noble and learned friend on the woolsack as to the certainty of this testator being aware of the existence of the Stanley baronetcy, and of the connection of that baronetcy with the old family estate of Hooton, it is not unworthy of observation that the old family baronetcy, dating from 1661, was bestowed upon a certain William Stanley, who is described as "William Stanley, of Hooton, in our county of

Chester." At the time, therefore, of the testator making his will, the baronetcy and the estates had been connected for upwards of 150 years, this will being made in 1814. Well, my Lords, it appears to me that he was anxious, even in the case of the devise to the Fermors, that the name of Errington should be perpetuated in connection with the estates; but here, when he arrives at these devisees—the children of his great-niece—whom he wishes to be the next objects of his bounty, he carefully provides, in the first instance, that the estates shall not be commingled with the Stanley estates and the Stanley baronetcy, by selecting the second son out of those four sons who were then born to Sir Thomas Stanley. He takes care that the eldest son, to whom in the natural course of events the Stanley estates and baronetcy would descend, shall not be to the possessor of the estates which are thus given by his will. In order to take care of that, when he names the sons of Sir Thomas he omits William, the eldest, altogether from any bounty under his will, and proceeds to Rowland the second son. He names him, and he names John, the present Sir John Errington, and he names Charles, who seems to have died before his elder brothers; and having proceeded through those three, limiting estates for life, with remainders in tail to those three several members of the Stanley family, he then, in the event of all failing, carries over the property to the several *persons now claiming at your Lordships' [714 bar, who are his heirs-at-law.

Then comes the clause shifting the use in the event which is there mentioned, and which has given occasion to this litigation. He declares: [His Lordship read the clause.]

Now, my Lords, if we are to adopt the construction contended for by the appellants, we do really arrive at a will so singular and so whimsical in itself, that nothing but the necessity of clear and explicit words so directing would justify you Lordships, I think, in coming to the conclusion that that interpretation contended for by the appellants ought to be assigned to the devise, unless in the least probable of all the events which might happen, namely, that William, the eldest son, should happen to survive all his three brothers, Rowland, John, and Charles, it would be impossible, according to the appellants' construction, for the estate to remain in any of the devisees to whom the testator had bequeathed it. If William survived them all, it might be said that none of the three others, according to the construction then given, would become "the eldest son," for he would remain the eldest until the last. But in the

event of his death, according to the appellants' construction, long after the father, Sir Thomas's death, every one of those three in succession might become "the eldest son" of Sir Thomas. What the succession might be does not signify, whether Charles died first, or Rowland died first, or John died first, still they would come into possession of the estates in the order of their succession as mentioned in the will, that is to say, in the order of birth; but there must be a survivor of them. William, the eldest son, is out of the question by the hypothesis, namely, that he is dead before the other three, and accordingly not a possibility remains but that each person coming into possession must become "the eldest son," unless indeed he is taken off by death, so that it goes to his children. Now, my Lords, the scheme I have thus described is one of the most unnatural that it is possible to conceive. Farther than that, however, this might be, that when the one came into possession of the estate, whether it was Rowland, John, or Charles, he might die leaving numerous issue, and those issue, if he died before them, might take the estate. I will take the case of 715] William, the eldest, first. If William dies *leaving issue, those issue would have the full benefit of the Stanley estates. They would have become the baronets, having possession of the estate of Hooton; but the next son, Rowland, taking the Errington estates, would, as soon as he came into possession of them, find himself deprived of them on William's death, although at the same time it would be impossible for him to take the Stanley estates, or to take the baronetcy which came through the name of Stanley. That condition of things seems to me one of the most unnatural that can be conceived.

Now, my Lords, what is the actual wording of this clause? It is when they "shall become the eldest son." As has been already observed, that is an interpretation in which you must introduce some idea not expressed accurately in language by the words which are used, because as far as the words used are concerned they denote an impossibility, because a son, who is at any time second son, and as to whom that fact is ascertained, could never become the eldest. We must, therefore, give such a meaning as can be best given to a will which is inaccurately worded. The meaning which appears to me most adequately to meet all the intentions apparent on the face of the will, namely, the keeping the Errington estates separate from the Stanley estates and the baronetcy, and taking care that they shall go in devolution as Errington estates as long as the law will permit, I say the

interpretation which is the most natural to adopt for that purpose is to read it thus: In the event of the one who takes the Errington estate coming exactly into the position of that eldest son who has been excluded by the testator, becoming (that is to say) the heir apparent of Sir Thomas, who lived long after the testator's death (and died in 1841), if at any time thereafter any one of the three younger brothers should occupy the position of him whom I have already excluded by my bequest, as being the heir apparent of Sir Thomas Stanley, of Hooton, then and in that case becoming eldest son in that sense I desire the estates to go over.

My Lords, the learned Lord Justice (Lord Justice Bramwell) who differed from the majority of the Court of Appeal in the decision which was come to in the court below, puts the case in this way, and I need hardly say that to everything he says I always look to with the greatest attention, and give the greatest possible *consideration. He [716] says that the question is not "what is the meaning of the words 'become eldest' and 'son' in themselves, it is what is their meaning in conjunction, and as the testator has used them. 'Eldest son' may mean one thing abstractedly, and another thing in conjunction with other words. If nothing else appeared, I should say that 'eldest son' meant 'the eldest born.' Here it does not mean that, because it supposes that each and all of the four sons may be 'eldest.' If any one said"—(this illustration appears to me to mark a most incorrect view to take of this will)—"if any one said that William IV was the eldest son of George III, he would not only use careless and inappropriate language, but would convey a wrong idea to his hearer. If he said that on the death of George IV, William IV became the eldest son of George III, and as such succeeded to the throne, his language might be inaccurate, critically or hypercritically considered, but it would convey no erroneous idea to the hearer." But, my Lords, mark what the learned Lord Justice introduces as a supposition, and as an explanation of the term "become the eldest son," in this will. He supposes a person to be telling another that William IV became the eldest son of George III, and as such succeeded to the throne. If in this case Rowland had in the lifetime of his father become in that sense the eldest son, and had come into the position of William, so as to succeed to the Stanley baronetcy immediately on the death of the father, then the illustration put by Lord Justice Bramwell would apply. But the case before us is this, that it is not a succession to the father, but a succession through the brother, which

brother, for aught the testator knew, might have full power of disposing of the estates, or might leave children who would succeed to the baronetcy and to the Stanley estates.

What I apprehend is the reasonable construction to give to a will of this kind is that which Lord Justice Bramwell seems to put, just in the same way as it was put by the noble and learned Lord on the woolsack in fact, and that is this: Place any one of my devisees in the position of the son William, whom I have excluded, make him become the eldest son as William is now the eldest son, that is to say, put Rowland or either of his brothers, John or Charles, in the position of being able, on the death of 717] their *father, Sir Thomas, to inherit the Stanley estates and the Stanley baronetcy, then and at that time their interests in the Errington estates shall cease. But in the events which happened they were never placed in that position. In the events which happened—the father surviving till 1841, and the testator dying in 1819—Sir William succeeded to his father in 1841, and held those estates till 1863. It is not necessary for me to say he actually alienated the estates; it is enough for me to say that he had full power to do so. Therefore Sir Rowland Stanley never did come into the position of being the eldest son of his father at a period when it would be of avail, that is to say, when, by the death of the father, he would enter at once into the possession of both the Stanley baronetcy and the Stanley estates.

I think my Lords that the true meaning of the testator in this will may be found by carefully considering the prevailing and ruling intent throughout, namely, that the Errington estates shall remain, *quâ* the Errington estates, as a distinct inheritance, separate from the Stanley estates and the Stanley title. In the circumstances which have happened he has not provided for that by using the words “become the eldest son,” unless he means have become the eldest son at the time the father dies, and when the relation of heirship ceases. I think nothing in this will can be extended to the case of a succession to a brother, who might have parted with the whole of the estates connected with the Stanley title, and from whom therefore nothing would come to Sir Rowland, who on the one hand would lose the Stanley estates, and on the other hand would, according to the construction of the appellants, see the Errington estates pass over to others, although he might be found to be in truth in the very position in which the testator would have wished to place him, namely, the founder of an Errington family,

which I apprehend to have been the chief intent and purport of the testator.

LORD SELBORNE: My Lords, successive life estates, with remainders to their respective male issue, are by this will limited to Rowland, John, and Charles, the three younger sons living at the date of the will of a living father, described on the face of the will as "Sir Thomas *Stanley, of [718 Hooton, in the county palatine of Chester, Baronet," who was well known to the testator, having married his great-niece. All the children of Sir Thomas were then infants of tender years. No estate is given, either to Sir Thomas himself or to his eldest son and heir apparent, named William. There were in the will prior limitations to a nephew of the testator of another family and his male issue, but that nephew died without issue in the testator's lifetime. Subject to the estates so given to Rowland, John, and Charles, and their issue, the ultimate limitation was to the testator's own right heirs.

Sir Thomas Stanley was, and was known to the testator to be, the owner in possession of a large family property, including his place of residence at Hooton. Letters patent of King Charles II, by which the baronetcy was created immediately after the Restoration, are in evidence. The first baronet is there described as William Stanley, of Hooton, in the county of Chester, Esquire, a man respected for his family, patrimony, estate, &c. If Sir Thomas had been understood by the testator to be the owner in fee simple of the Hooton property, it would have enabled him to provide in a suitable way for those who might succeed him in the family honors; and it would, even in that case, have been natural for the testator to presume that he would do so, inasmuch as it is not suggested that he was of such habits or character as to make it probable that he would dissipate his patrimony. In point of fact, however, the Hooton property had been settled upon the marriage of Sir Thomas with the testator's grand-niece, in the usual manner, viz., upon Sir Thomas for life, with remainder to his first and other sons in tail male. If it were necessary I should be much disposed to think that, in the absence of evidence to the contrary, this settlement of the property, though not referred to in the will, might be assumed to have been known to the testator, but it is sufficient to say that he may at least be supposed to have contemplated the probability that a settlement of some such nature had been or might be made, and under these circumstances, whether he knew of the actual settlement or not, he might well regard an eldest son and

heir apparent of Sir Thomas Stanley as sufficiently provided for, both in his father's lifetime and afterwards.

These are all the facts which seem to me material to the
719] *construction of the shifting clause in the will, under which the devised estates are, in the event of any one of the three sons of Sir Thomas, who are successively made tenants for life, "becoming the eldest son of the said Sir Thomas Stanley," and "so often as the same shall happen," to go over in the same manner, as if such son were, at the time of such event happening, dead without issue.

The appellants contend, that the effect of this shifting clause is the same as if the testator had directed the estates to go over, in the event of any one of the devisees for life surviving his elder brother, if only one, or all his elder brothers, if more than one; and that *toties quoties*. The respondent, on the other hand, says that the phrase, "eldest son," is in this clause equivalent in its effect to a son who should be his father's heir apparent. The Master of the Rolls and Lord Justice Bramwell adopted the construction of the appellants. Lords Justices James and Baggallay that of the respondent. I agree with the Lords Justices from whose order this appeal is brought.

It being common ground that the word "eldest" cannot here mean "first-born," the appellants introduce the word "surviving" between "eldest" and "son," and so make the "eldest son of the said Sir Thomas Stanley" to mean "the eldest survivor of the sons of the said Sir Thomas Stanley." But the respondent denies that it is either necessary or right so to imply the word "surviving" between "eldest" and "son." He asserts that the words are sensible as they stand, without any addition or alteration, because there is a common and well understood sense in which a younger son, succeeding to the status of the first-born, with respect to rights of primogeniture in his father's lifetime, does actually, upon the happening of that event, "become the eldest son" of his father; and he says that the intention of the testator, as it is to be collected from this will, was to exclude any son of Sir Thomas Stanley who might at any time during the life of Sir Thomas possess that status, passing over the first-born son (who necessarily possessed it) and his issue in the first instance; and by the shifting clause, treating any other son, who might afterwards come into the position of the first-born, in the same manner as the first-born himself had been treated. The will
720] so interpreted proceeds upon a *consistent scheme, and only excludes such sons (with their families) as might

reasonably be assumed to be otherwise provided for. On the other hand, according to the appellants' construction, its operation is quite arbitrary, making the exclusion of the younger sons to depend on the mere accident of the relative duration of their own and their elder brothers' lives, without any consideration whatever of the probability or improbability of their being in any way provided for; and involving their respective lines of male issue in the same misfortune, though in the name and arms clause an intention is rather anxiously manifested not to forfeit the estates of issue for their parents' fault.

It appears to me that the construction of the respondent is not only the more reasonable, but is also the more strict and literal. One test of this is, to consider in what events (if any) the very words used in this clause, "the eldest son of Sir Thomas Stanley," might have been properly employed in a deed, will, or other instrument, to describe one who was originally a younger son. If any event might have happened, in which such a person might properly have been so described, and if another event has actually happened in which this could not be done, then it follows that in the former case he would have "become the eldest son of the said Sir Thomas Stanley" in a sense not requiring the introduction of the word "surviving" between "eldest" and "son;" in the latter he has not. Now it appears to me clear that if Rowland had, in Sir Thomas Stanley's lifetime, become his father's heir apparent by the death of his brother William without issue, he might, without any deviation from the common use of language, have been thenceforth, during his father's life, described in deeds, wills, and other instruments, as "Rowland, the eldest son of Sir Thomas Stanley, of Hooton, Baronet." And I think it is equally clear that if William had died, leaving male issue, Rowland could not (while the line of the first-born and his rights of primogeniture were still represented by the issue of the first-born) have been properly so described; nor could he, according to any known use of language, have ever been so described, if both the brothers had survived their father, and if Rowland, succeeding not to his father, but to his brother, had eventually become the baronet and head of the family, as he actually did.

*It is to be observed that the words "become the [721 eldest son of the said Sir Thomas Stanley" signify *prima facie* a relation between son and father rather than survivorship between brothers.

The appellants' construction deprives the mention of the

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father of all force, and reduces the whole to what a common clause of survivorship would more simply express.

These considerations might easily have yielded to any controlling context, or to any sufficient arguments founded upon reasonableness and probability of intention; but in this case there is no controlling context, and all the arguments founded upon reasonableness and probability of intention are in favor of the interpretation of the words which, in my judgment, is also the more strict and literal. I concur, therefore, in the opinion that the order of the Court of Appeal ought to be affirmed.

LORD BLACKBURN: My Lords, I have come to the same conclusion. I have had the advantage of perusing the opinion of my noble and learned friend on the woolsack, and I have only to say, that I concur in his reasons without addition or alteration.

LORD GORDON: My Lords, I also concur; and, having had the same advantage as my noble and learned friend opposite (Lord Blackburn) of perusing the opinion which has been delivered by my noble and learned friend on the woolsack to the House, I feel very strongly in favor of the course which he has proposed, namely, that the judgment of the court below should be affirmed.

The question has arisen with regard to the effect of one of those shifting clauses in entails which are, especially under the act of 1685, more frequent in Scotland than in this country, and while in some cases which have come up before your Lordships' House on appeal, they have not been regarded as illegal, still, I think the view taken by Lord Cranworth is the correct one, namely, that they are not to be favored, and that if you find that they lead to capricious results, you will adopt a construction which will get rid 722] *of the operation of the clause, but still give full effect to the intention of the testator. I think, in the present case, the citation of the opinion of Lord Cranworth clearly justifies the result which your Lordships have arrived at.

Decree appealed from affirmed; and appeals dismissed with costs.

Lords' Journals, 23d July, 1877.

Solicitors: Bonner; Gregory, Rowcliffes & Rawle; Meynell & Pemberton; Few & Co.; Rashleigh & Smart.

[2 Appeal Cases, 723.]

H.L. (Sc.), May 17, 1877.

[HOUSE OF LORDS.]

***ROBERT GARDNER, Appellant; MARY GARDNER, [723
Respondent (').**

Presumption of Paternity.

Where, after open courtship and constant intercourse, a man and woman (she being ultimately in an advanced state of pregnancy), hurry on their marriage to prevent, or to mitigate, scandal; and where in less than seven weeks after the marriage she gives birth to a child; the presumption of the husband's paternity to that child is next to insuperable.

Per THE LORD CHANCELLOR (¹): The presumption is not a *presumptio juris et de jure*, but a presumption of fact:

Held, by the House, affirming the decision of the Second Division of the Court of Session, that the *onus* of establishing the husband's denial of paternity lay on himself, and that he had wholly failed to discharge that *onus*.

IN 1839, Mr. Gardner, a farmer near Melrose, proposed marriage to a Miss Brodie, but was then rejected. He afterwards went to Australia, whence he returned in 1846. Renewing his former courtship, Miss Brodie ultimately accepted him, she being then pregnant. They intermarried on the 29th of August, 1850. Seven weeks afterwards, on the 16th of October, 1850, the wife, Mrs. Gardner, was delivered of a female child, the above respondent. Precautions had been taken to conceal the birth, and prevent scandal. The child was placed under the care of a nurse, Mr. Gardner paying all expenses, and arranging an allowance for the maintenance of the child. The girl attended the Free Kirk of the Rev. Mr. Kay, who, taking an interest in her, appealed to Mr. and Mrs. Gardner for their recognition of her as their daughter, but this they refused, deeming it desirable to conceal their ante-nuptial sexual connection, so as to enable Mr. Gardner to retain his position without impeachment as an Elder of the Church. He, however, placed the child in a school, paying all expenses, the girl addressing letters to him as "My dear father." In March, 1874, he proposed to allow her £40 a year, and to leave her £1,000 *at his [724 death; but on condition that she would renounce all claim to be his daughter. She refused to accept this offer, declaring that the establishment of her legitimacy was the prime object of her life.

In June, 1875, Mr. Gardner brought the present action, praying a judicial declaration that she was not his child;

(¹) Affirming Scotch Sessions Cases, 4th Series, vol. 3, p. 695. (²) Lord Cairns.

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and asking that she should be ordered to desist from asserting that she was his child. The child, now a young woman, Miss Mary Gardner, put in her defence; and the case came before the Lord Ordinary (Lord Craighill), who, relying mainly on the oaths of the husband and wife, that there never had been sexual intercourse between them until after their marriage, gave judgment to the effect that Mary Gardner was not entitled to be considered the child of Mr. Gardner, although the unquestionable child of his wife.

Against this decision Mary Gardner reclaimed to the Second Division of the Court of Session, who held that Mr. Gardner had failed to make out his case, his own actings in marrying a woman whom he knew to be pregnant, and in not at once repudiating the child at its birth, raising a presumption which the evidence he adduced was insufficient to rebut (').

Mr. Gardner thereupon appealed to the House, having for his counsel *The Lord Advocate* and Mr. *Darling* (of the Scotch bar), who contended that the presumption *pater est quem nuptiæ demonstrant* did not apply where the child must necessarily have been conceived before the marriage. In this case there was the oath of the husband, and of the wife, both denying all sexual intercourse between them until after their marriage. The authorities relied upon are cited in *Brodie v. Dyce* (').

Mr. *Trayner* (of the Scotch bar), and Mr. *Alexander Robertson*, were heard for the respondents, insisting that the appellant had failed to prove his allegations. According to the law of England a man by marrying a woman whom he knows to be with child, acknowledges that the child is his own ('). The law of Scotland does not differ in this respect ('). The appellant, by marrying *Mrs. Gardner when he knew that she was pregnant; by not disclaiming the child born after the marriage; by assuming the burden of its maintenance and education without charging any one else with the paternity—these facts were of themselves amply sufficient to rebut the appellant's attempt to displace the presumption of the respondent's legitimacy (').

(1) Fourth Series, vol. iii, p. 695.

(2) Nov. 29, 1872, 1 Macpherson, p. 142.

(3) *Rex v. Luffe*, 8 East, 207.

(4) *Jobson v. Reid*, 8 Shaw, 343; *Morris v. Davies*, 5 Cl. & F., 363; *Lepper v. Brown*—case of a ripe child born five months after marriage, Hume's Decisions

of the Court of Session, p. 488; *Aitken v. Mitchell*, case of early birth and acknowledged intercourse before marriage, Hume's Decisions of the Court of Session, p. 489; Sir Harris Nicolas's Treatise on Adulterine Bastardy, p. 291, Case of the Earldom of Banbury.

The following opinions were delivered by the Law Peers :

THE LORD CHANCELLOR⁽¹⁾: My Lords, this case has been argued at your Lordships' bar with very great ability. Everything which could be said for the appellant has been said by the Lord Advocate and Mr. Darling. On the other hand, your Lordships have heard from Mr. Trayner an argument remarkable not merely for its point and strength, but what perhaps is more unusual, for its conciseness.

My Lords, the case itself is perhaps one of the most remarkable that has ever come before a court in Scotland. The action is instituted by the appellant for the purpose of "putting to silence" a claim made by the respondent to be his daughter. The Lord Ordinary, before whom the case came in the first instance, gave effect to the conclusions of the summons, and gave the relief which was asked. On the other hand, the judges of the Court of Session, upon a reclaiming note, were unanimously of opinion that the appellant had failed to establish that he was not the father of the respondent, and, therefore, they assoilzied the respondent from the conclusions of the summons; and it is against that determination of the Court of Session that the present appeal is brought.

I will remind your Lordships very shortly of some of the matters which are so freshly in your Lordships' minds. The *onus* of proof in the case lies entirely upon the appellant. He takes upon himself to establish the proposition that he is not the father of the respondent; and if he does [726 not establish that proposition he cannot succeed in obtaining the conclusions of the summons.

Now, my Lords, the history of the case may be conveniently looked at by dividing it into two parts; and in the first place I will remind your Lordships of those parts of the case as to which either there is no dispute, or they are established beyond the possibility of controversy. I will then place before your Lordships the parts of the case as to which there is controversy. There is no controversy about this: the appellant and his wife, who is still alive, were married in the month of August, 1850; they had been acquainted for some years before the marriage; their courtship had continued for some years. The appellant and the lady who is now his wife having been in the habit of associating together, she, a short time before the marriage, made a communication to him that she was pregnant. If during their intimacy any intercourse, in the technical sense of the word, had taken place between them, that communication

(¹) Lord Cairns.

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might not have taken him by surprise. But that which was done was this: with his knowledge, and apparently with his concurrence, the lady went from Tweedside, where they were both living, to Edinburgh to consult Dr. Thatcher, a physician in Edinburgh of some note at the time. The physician told her, although according to her evidence she had herself little doubt before of the matter, that she was in the family way; and it appears that, being made aware that a marriage was contemplated, he suggested that the sooner the marriage took place the better. The result of the interview with Dr. Thatcher was communicated to the appellant. He was not satisfied; but he himself went a day or two afterwards to see Dr. Thatcher; and heard from Dr. Thatcher that which the lady herself had heard. The appellant says that he gave Dr. Thatcher to understand that he was not the father of the child. But, my Lords, I cannot take that as any statement which could be received that he had made to Dr. Thatcher any clear and distinct communication on the subject. In the absence of a clear and distinct communication, the circumstances of the case, the manner in which Dr. Thatcher was consulted, must have conveyed to the mind of Dr. Thatcher that the relations between the appellant and the lady who had come to him were those 727] which would have *fixed the paternity of the child upon the appellant. However, Dr. Thatcher seems to have told the appellant, as he told the lady, that the marriage had better take place as soon as possible, and the marriage did take place in about six weeks, as I understand it, after this time, namely, in August, 1850.

The appellant then took the lady to the farm where he lived—his own home; and about six weeks after the marriage, the time for her delivery being imminent, they both went to an Edinburgh hotel; the appellant and the lady going there apparently not otherwise than as husband and wife; and on the morning they arrived the lady was taken with labor of childbirth. Dr. Thatcher was sent for and the child was born. That is said to have been on a Tuesday; and on the Thursday the child was given to the care of a nurse, and taken away from the hotel. After some time the appellant and the lady left the hotel, and apparently returned to their own home. From that time until the year 1872, a period of twenty-two years, neither of them saw the child—a girl. There is not very clear evidence as to what she was generally called, or what she was intended to be called; but, apparently from the circumstance that one of the garments, a plaid, which had been put around the child at first, hav-

ing been marked with the name of "Gardner," that name seems to have gone with her, and more or less to have been the surname by which she was, occasionally at all events, called. The appellant, however, regularly for a period of sixteen or seventeen years supplied through Dr. Thatcher the sum requisite for the maintenance of the girl; and the supply of that maintenance was discontinued when the girl was sixteen or seventeen years of age, not from any repudiation of the obligation to supply it, but because at that time it was the expressed opinion of the appellant that she had come to an age when she might be able to support herself; and accordingly she appears to have supported herself by working in a manufactory. However, in the year 1872 having been led by circumstances, to which I need not refer, to suspect that the appellant and his wife were her father and mother, the girl, who was then of the age of twenty-two, went to the place where they were resident, saw her mother, and introduced herself as her child, and apparently laid claim to both the appellant and her mother as her parents.

*My Lords, I pass rapidly over what passed during [728 the succeeding three years. It is clear that at that time the claim being made by the girl to be the daughter of the appellant as well as of his wife, that claim was in the first instance disputed; but there is this remarkable fact, that during those three years, there being repeated meetings with her, and she being placed by the appellant in a school where her education might be improved beyond the point it had reached, the appellant supplied during those years ample funds for her education and for her maintenance—funds amounting to between £120 and £130, it is said, in one year. A correspondence continued during that time in which he directs his letters to her by the surname of "Gardner," and she addresses him as her "father," or her "dear," or "dearest father"; and at one of those meetings which occurred, it must be remembered, whilst the controversy still continued as to whether he was or was not her father, it is admitted that he offered to portion her with a sum of £1,000 payable at his death, and with an income in the meantime of £40 a year, and both were refused by her because not coupled with an acknowledgment of her as his daughter.

If the case rested there, and your Lordships had nothing more to deal with than the facts which I have stated, the marriage to a woman avowedly pregnant, and near the time of her delivery, by a man who had been courting her and keeping company with her; and her delivery taking place

in the way I have mentioned, the child being provided for by the husband, although reasons for secrecy might easily be discovered, from the desire of preventing, at all events in the first instance, the scandal which might be occasioned among the connections of a married woman—still the facts which I have described would raise (I agree, with regard to Scotch law, not a presumption *juris et de jure*, but) a presumption of fact so strong that the man was the father of the child, that it would be extremely difficult to rebut or controvert it. Speaking of Scotch law only, and putting aside the much stricter presumption which in the case of English law would be drawn from those circumstances, I take the expression of Scotch law by Lord Gifford to be one which is accurate in itself, and which, indeed, was not challenged in the argument of this case. Lord Gifford says:

729] *A certain presumption of paternity arises from the bare fact that a man knowingly marries the mother of an illegitimate child previously born. But this is a very weak presumption. In the absence of all other evidence, all that can be said is probably that it is more likely than not that he is the father. Such presumption would be greatly strengthened if previous to the marriage the mother of the illegitimate child had been the mistress or concubine of the man who afterwards married her, and had cohabited with him at or about the time of conception, and the adoption or acknowledgment of the child as his by the husband would probably make the presumption almost conclusive, though still capable of being rebutted by contrary proof. Where, as in the present case, a man marries a woman who at the time of marriage is in a state of pregnancy, the presumption of paternity from that mere fact is very strong, and is, perhaps, in almost all such cases, in entire accordance with the actual truth. Still further where the pregnancy is far advanced, obvious to the eye, or actually confessed or announced, as in the present case, to the intended husband, a presumption is reared up which, according to universal feeling, and giving due weight to what may be called the ordinary instincts of humanity, it will be very difficult indeed to overcome. The man who marries a woman in the condition in which Mrs. Gardner was on the 29th of August, 1850, the date of their marriage, when she was seven or eight months gone with child, says almost as emphatically as he could do by the most express words, I am the cause of the pregnancy and the father of the expected child⁽¹⁾.

Now, my Lords, having referred to what I have termed the facts of the case as to which there is either no dispute or no serious controversy, let me now remind your Lordships of the statements upon the other side brought forward for the purpose of getting rid of these facts. The statements are those of the appellant and of the mother. They are statements which appear to depend entirely upon the evidence of the appellant and the mother alone; and which cannot be directly and distinctly, at all events as to the material part of them, checked or controlled by opposite testimony. The material statement of the appellant and of the mother, as to which there is the difficulty which I have

⁽¹⁾ Fourth Series, vol. iii, p. 721.

referred to of checking their testimony, is this: they say that before marriage they never had carnal intercourse—that is the statement of both. They state, further, that before marriage, and immediately before the consultation with Dr. Thatcher, the lady told the appellant that she had met on the moor, near her brother's house, some months before, a man whom she termed a low person or a blackguard, who had in substance violated her person; and she attributed to this cause her pregnancy in the *conversation which [730 she had with the appellant. That is her statement, and that is her husband's statement. She further states, and her husband states also, that about a year after the marriage, being in a state of weakness and illness, she made a further disclosure to her husband, not consistent with that which she had made before marriage, that she told him upon that second occasion that she had had before marriage connection with a man whom she knew and named, Laidlaw, a shepherd of her brother's; and that it was Laidlaw who was the father of the child in question.

Now, my Lords, I must pause here for the purpose of referring to the first of these statements, the statement after which the appellant says he married this lady. It is a statement which I am bound to say appears to me, as it is given, to be one of the most improbable statements, one of the most difficult of belief that it is well easy to imagine. The statement is this, that a lady in a respectable position of life made this statement to the appellant, also in a respectable position of life, before marriage, that she had been forced and ravished; and that he made no further inquiries about it than to ask her by whom, and she said she did not know—a low person, a blackguard; and that thereupon all inquiry on his part ceased, and that he, in a temper of romantic attachment, married the lady under those circumstances in order to shield her from the scandal which would arise from her pregnancy becoming known, and the birth of her child being made public.

It does appear to me that upon the mere statement of that story, without more, it is so contrary to the mode in which mankind generally act that, although it is impossible to say that it cannot be true, it is not too much to say that it is in the highest degree unlikely; and very strong corroboration would be required, or at all events it would be necessary to see that those upon whose testimony that story is to be accepted have always spoken with veracity and consistency, and in a manner which shows that their recollection and their accuracy of speech is entirely to be accepted.

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I will ask your Lordships to try the evidence by those tests; but I am anxious, in the first place, to put aside what appears to me to be of comparatively minor importance in the case, but *which yet seems to have occupied a good deal of the attention of the court below. I mean the episode, if I may term it so, with regard to Laidlaw. He has been called as a witness in the case, and in form he denies that he had carnal intercourse with the lady; but his evidence is open to considerable observation, and it is said that it cannot be reconciled with the statements which he appears to have made in letters which are put into his hand and upon which he is cross-examined. My Lords, I should prefer, in the view I take of this case, to assume, although I only put it by way of assumption and not as stating that it is a conclusion I have arrived at, that there was evidence which might be held to establish intercourse with Laidlaw before the marriage, but I repeat that I do it merely by way of assumption for the purpose of what I have still to say. My opinion is that that is only a part of the case, and by no means the largest part. It may well have been that there was intercourse with Laidlaw, but the question remains; the great question in the case, Was there, or was there not, intercourse between the appellant and the lady who afterwards became his wife; because if there was, there is then at once the means of accounting for the chain of circumstances to which I have already referred, and from which would flow the presumption of which I have spoken.

Now, my Lords, there was the possibility of intercourse—there was the opportunity for it—there was everything in the conduct of the parties which would lead you to suppose, unless the contrary is clearly made out, that there had been that intercourse, and the treatment of the child was on the footing of the child having been a child of the appellant.

But is the testimony of the appellant and of the lady to be accepted as negating the fact of that intercourse? Now, my Lords, there, unfortunately, your Lordships have what I must term the opposite of clear, consistent, and unhesitating testimony. In the first place, I refer to the evidence of the lady. She stands convicted by her own confession of having made before marriage a statement which was not consistent with what she now says was the fact. She made to the appellant the statement that she had been ravished against her will by a person unknown to her. The statement she now makes is that she had a connection which 732] *cannot be described by the name of ravishment with

a person perfectly well known to her. But there is this further inconsistency in her testimony. In the condescendence which professes to give a narrative of this part of the case, and which must emanate from the statements and the instructions of the lady, there is a statement that she had connection with Laidlaw twice or oftener; and the actual places where the connection took place are mentioned. But in her testimony she recedes from that statement, and says that she had connection once, and only once, with Laidlaw, and denies any further connection.

With regard both to the lady and the appellant himself there is this further observation in regard to their evidence. In the course of that period of three years to which I have referred, between 1872 and 1875, they had frequent meetings not merely with the girl but with a minister of the Free Kirk of Scotland, Mr Kay, to whose congregation the young woman belonged, by whom she had been baptized, and who appears to have taken an interest in her welfare. The Lord Ordinary speaks of Mr. Kay as being a partisan of the respondent. A partisan undoubtedly he was in this sense—that he appears to have believed that the respondent was the daughter of the appellant, that she ought to have been acknowledged as such, and that a wrong was being done to her by the refusal of such acknowledgment. But my Lords there is nothing whatever that I can observe, either in the course taken or in the expressions used by Mr. Kay, which for a moment would authorize your Lordships to hold that there was any reason why the evidence of Mr. Kay should not be accepted according to its literal effect, or which could impute to Mr. Kay any motives for departing from the strict line of truth in the evidence which he has given. My Lords, if the evidence of Mr. Kay is looked at, as I think it must be, as evidence entirely worthy of credit, from that evidence it is proved to demonstration that both as to the appellant and as to the lady they, in the course of the communings between Mr. Kay, the appellant, the lady, and the young woman, made at different times statements which are at variance with the evidence which they now give.

My Lords, the statements of the appellant and his wife being as it seems to me in the highest degree improbable, they being *statements as to which they have not [733 been consistent at different times, and being statements especially which are highly inconsistent with expressions which have fallen from them during the period between 1872 and 1875, when the question of the paternity of this young woman was in the first instance raised, I come to the

conclusion that I cannot, as against what is the presumption arising from the conduct in this case, accept mere declarations, even on oath, of the appellant and his wife against the legitimacy of this young woman. These, my Lords, are the short grounds upon which I arrive at the conclusion which was unanimously arrived at by the decision now appealed from. I cannot find any fault with that determination; and therefore I submit to your Lordships that this appeal should be dismissed with costs.

LORD HATHERLEY: My Lords, in this very painful case I have come to the same conclusion as that which has just been expressed by the noble and learned Lord on the woolsack. The burden of proof of the proposition that this girl Mary is not the child of the pursuer, who seeks to restrain her from claiming so to be, is thrown upon him; and the judges of the Second Division of the Court of Session have come to the unanimous decision that he has not discharged that burden, and has not proved that this girl Mary is not his child. The Lord Ordinary came to a different conclusion. I must confess that I greatly regret that a case of this kind should not rather have been submitted to a jury than brought before the judges sitting as judges both of fact and of law. However, that is the course of practice, and we have to deal with the case as we best may.

The remark caught my attention once or twice, I think, in the course of the Lord Advocate's able address, that we had not the advantage which he said the Lord Ordinary had of seeing the demeanor of the witnesses; but, my Lords, there is something in this case which, with regard to the more important witnesses certainly, diminishes the regret I might otherwise feel at not having been able to observe their demeanor when examined.

In course of the argument a great deal has been said upon presumptions of law and maxims of law. With regard to 734] presumptions *as being applicable to this case, I think that the presumptions being, as is allowed by the judges, and as was allowed by the counsel at the bar, certainly not *de jure*, whatever may be said as to their being presumptions *juris*, it really comes only to this, that we are to look upon these so-called presumptions simply as deductions which sensible men make from the facts which are laid before them as evidence, open therefore to rebuttal by the same class of evidence, that is to say, oral testimony, as that by which the propositions they are supposed to point to are demonstrated and proved; in other words, by a contest of

evidence, such as I consider there is in this case, and I approach the case with that view.

That being so, let us look at what the natural probabilities of the case are with regard to the facts disclosed. The facts disclosed, independently of the oral communications made from one person to another, are these: You have a gentleman who has for many years been paying courtship to a lady, now his wife, Mrs. Gardner. You have the fact that shortly before the period which seems to have been arranged between them for a marriage she is found to be pregnant, at a time when, of course, it was impossible that the pregnancy could have occurred in an honorable or reputable manner. She is, notwithstanding that, married; having gone before the marriage to consult some medical man, and it being declared by the medical man that she is undoubtedly near to her confinement; and after the marriage she is taken first to an out-of-the-way place at the seaside, and thence to Edinburgh, where, with a good deal of privacy which the landlord describes by the expression that the matter was shrouded in mystery, she is confined at an hotel. We find that the persons engaged with regard to that confinement, the medical man who was consulted before the marriage, and the person who attended her during the confinement, were all retained, if I may use the expression, and paid by Mr. Gardner, who had married the lady a few weeks before the confinement. We then find a fact upon which too much stress ought not to be laid, but a fact of some little consequence in the matter, namely, that the child when brought into the world, very scanty clothing having been provided for it, is wrapped up in a plaid which undoubtedly is known to have had *the name of Mr. Gardner upon it; [735 there was "R. Gardner" in the corner of the plaid. Being wrapped up in that plaid the child is carried off by Mrs. Hutchinson, and is never again seen during childhood by either Mr. Gardner or the undoubted mother, Mrs. Gardner. The child, however, was maintained to the age of fourteen, and by whom? By Mr. Gardner, who did not cease to maintain the child until the time had come when she was able to maintain herself; he does not seem to have thought it necessary to proceed after that with her maintenance, but up to that time the child was maintained by him. The child had not obtained so far as we can see in these proceedings any repute either by name or otherwise as being the child of Mr. Gardner. This part of the case is left in some uncertainty still. The child was baptized by the clergyman who has given his evidence in this matter when she was about

sixteen years of age, soon after the time when she went to work at a mill in Loanhead, when she became a member of his congregation. She was baptized simply as "Mary." But from that time she seems to have commenced writing a series of letters to Mr. Gardner, in which she called him first "dear Mr. Gardner," and afterwards "dear father," and signed herself as "Mary Gardner," to which he responded, addressing his letters to her as "Mary Gardner."

Now, my Lords, putting all these circumstances together, there would have been very little doubt indeed as to the paternity of the child if matters had rested there. But then we are met with a very extraordinary story—that before the marriage Mrs. Gardner confessed to her intended husband that she was pregnant, and that the pregnancy occurred in this way: that she met, as she expresses it, a blackguard on a certain hill near the place where she resided, and that this blackguard forced her, and that the consequence of that was the state in which she found herself. He says that she was in such a state of agitation and distress at being obliged to make this communication, and that she was, as he believed, so attached to himself, as he explains it, that he was afraid that if the marriage were then broken off she would destroy herself, and he accordingly made up his mind to cover her discredit by marrying her at once; and then endeavored, in order not to be fixed any more than could possibly be helped [736] with the burden *of a child who was not his own, to keep the story secret until the time came when by living as man and wife, and not having this child brought before their notice, and the time being come, as he afterwards expresses it, when she could maintain herself, this disgrace of the wife would, as he thought, be obliterated.

That in itself is an extremely singular story; and what marks the singularity of it more than anything else, I think, is, that he says that when he went to the medical man at Edinburgh and heard what he had to say upon the state of his wife, he gave him to understand that he was not the father, and after he had given him to understand that he was not the father, the medical man recommended him, by way of protecting his wife, if that were his wish, to hasten the marriage, to lose no time in getting the marriage performed, because she was very near her confinement. I confess that that is a view of the case which I have never been able to follow as consistent with the ordinary rules of probability; but it seems to have received the sanction of some of the learned judges in the court below, though not of all, and certainly not of the Lord Justice Clerk, who appears to

have taken the same view as I have taken of that part of the case, namely, that it requires a very considerable stretch of charitable allowance to suppose that this was a really true and correct narrative, namely, that being told that the lady is to have a child which is not your own, the medical man whom you consult tells you the best course you can take is to marry that woman as soon as possible.

My Lords, the *onus* of proof was upon the appellant, and that *onus* he certainly has not discharged.

LORD BLACKBURN: My Lords, I am of the same opinion. I think the question is not so much one of law as one of evidence, and the conclusions to be drawn from the evidence as to one point which I will state directly.

The question is whether or no Mr. Gardner, who is the pursuer, has sufficiently established that Mary Gardner, undoubtedly and admittedly the daughter of his wife, undoubtedly and admittedly born after wedlock, is not his child. That is the issue which he has taken upon himself to establish. The Lord Ordinary thought *that he [737 had established it. The judges of the Second Division unanimously thought that he had not established it; and the question now upon appeal is, whether it has been established or not?

Now, my Lords, I take it that we cannot express what I think is really the leading point here in better words than those which were used by Lord Gifford, namely,

Wherever an avowed and open courtship has taken place, and there have been opportunities of access, and thereafter the man marries the woman in an advanced state of pregnancy, knowing that she is so, and hurrying on the marriage, as happened here, for that very reason, I do not say that the presumption of paternity is absolutely conclusive, but I do say it is almost as strong as such a presumption can be.⁽¹⁾

Mr. Gardner and the lady, afterwards his wife, were in the habit of seeing each other during a long courtship; and it is idle to suppose that a woman working on a farm in Scotland, and a man, a farmer in the neighborhood, had not ample opportunity of intercourse together. Then she, thinking she was with child, consults him. That is admitted. He causes her to go and see Dr. Thatcher, and upon Dr. Thatcher's advice that she is with child and that they had better hurry on the marriage, they do hurry it on and are married.

My Lords, if the case stood there, I think nobody could have doubted that the *prima facie* presumption of the appellant's paternity was fully established. I do not think that that presumption is met merely by proving that some

(1) 4th Series, vol. iii, p. 721.

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one else had intercourse with the woman. That is a very important step, but I am far from thinking that that is sufficient by itself. I think in order to rebut such a case as this it is necessary to establish to the satisfaction of the tribunal which has to try the question that the husband, the man who has made this very strong case against himself towards admitting that he was the father of the child, had not had intercourse with the mother at such a time that he could be the parent of the child. I do not think that the presumption of parentage is nearly so strong in such a case as it would be or ought to be if the time when the child was begotten was after the parties were married and were husband and wife. But when it is *proved (supposing that to be the case) that the man who afterwards became the husband had connection with the woman who afterwards became his wife, so that he might be the parent of her child, I do not think you can in that case, any more than in the case of a child both begotten and born during matrimony, enter into an inquiry, which would be a very indelicate one, and one in which it would be almost impossible to prove the fact, as to who was the father of the child. Nevertheless, if you show that another man had connection with the woman at that time, you take a considerable step, you remove one of the things which would have been a great difficulty in your way in showing that the man who afterwards became the husband was not the father. As to the husband's not having had connection before marriage, what would be sufficient proof of that must, I apprehend, not depend upon any technical precise rule, but must depend upon whether it is made out upon the facts existing in the particular case.

Now here we have the distinct oaths of both the husband and the wife on a matter on which certainly I think they cannot be mistaken. They both positively swear that before they were married there never was intercourse between them at all. It is a very painful thing, my Lords, where there are distinct and positive oaths of that sort for any judge or tribunal to say,—I cannot believe those direct oaths: nevertheless it must sometimes be done. There are frequently things sworn to which are so improbable that one does not believe them. It is one of the commonest things in the world in a criminal case to have the most positive oral evidence given on oath to establish a matter which neither the jury nor the judge can believe, although it is sworn to. In this case I cannot act upon this evidence. I do not know that it is necessary to say that I disbelieve the appellant and Mrs. Gardner to such an extent that I should find them

guilty of perjury if I were upon a jury trying them on such a charge; but I disbelieve them to this extent—I cannot believe their testimony so as to act upon it in this case, and I will proceed to state why.

There is an extremely strong presumption through the whole history of the case that Mr. Gardner when he married a woman whom he knew to be with child, believed that he was the father of *the child—that he knew that cir- [739 cumstances had occurred which might have made him the father of the child, and therefore believed it. That strong presumption arising from his conduct has to be explained away. The story which Mr. and Mrs. Gardner tell to explain it away is, that she whom he had been courting, and whom, according to his account of the matter, he had never ventured to take the least liberty with, came to him and told him she feared she was with child, and that some months before she had been assaulted by a blackguard upon the hill; that she had never mentioned it to anybody (that is what the statement amounts to in effect) up to this time, when she came to him and told him this story. It is a most startling thing for one's notions of human conduct that a betrothed bride should go and say this to her betrothed husband,—that she should state this to him who was about to be her bridegroom of all persons. She had female relatives and others to whom she could have told it. But if she did state it, it is a startling story, which must have made an impression upon his mind—one would think he never could have forgotten what passed at that interview. He says, upon hearing it, he had the very romantic generosity that, in order to save her character entirely, he married her, believing her to be with child by this ruffian who had ravished her.

My Lords, what I proceed upon is this: I think here there was a strong *prima facie* presumption of fact made out that this child was the child of the appellant, and I do not think that that is rebutted.

LORD GORDON: My Lords, there is no dispute as to the law applicable to this case, I think, in the court below, or among any of your Lordships. Lord Gifford, whose judgment has been referred to, says that

The presumption arising from conception, or possible conception, during marriage is a mere presumption, which may be rebutted and overcome by clear and satisfactory contrary evidence. The law of Scotland has never made or treated this strong presumption as a *presumptio juris et de jure*. It must yield to evidence, and I think the law of Scotland has always been that the presumption may be overcome, not only by evidence that it was physically impossible that

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the husband of the mother could be the father of the child, but by every species
740] *of moral evidence sufficient to satisfy a reasonable mind that the child
was begotten by some one else than the husband ⁽¹⁾.

The question, therefore, comes very much in the shape of an issue to try whether Mary Gardner was the daughter of the appellant; and, while one may almost regret that the question has not been submitted to a jury, who might have seen the witnesses who gave them evidence, it is right that your Lordships should understand that the reason which I presume influenced the court was, that according to the old law these matters were treated before the judges acting as a Consistorial Court, and that there was a mere right of appeal to the Court of Session. I have not looked into the act of 1868 since the present question arose, but it does occur to me that under the act of 1868 it might have been possible to have brought this question before a jury. At the same time the court would be influenced to a great extent by the consideration that it is not desirable that questions of this character should come before a jury, and thereby become the subject of publication and general discussion; therefore they have reserved such questions rather more for the consideration of the court, as it has been done in this case.

Now the question is this, whether there has been proof that satisfies the court that Mary Gardner is not the daughter of the appellant. Upon that point there is no doubt that there is a strong presumption in favor of the paternity, where the child is born after marriage between the parties. In this case there is no doubt whatever that Mary Gardner is the daughter of Mrs. Gardner; that is admitted. The way in which it is attempted to be made out that she is not the daughter of Mr. Gardner is that an account is given of an occurrence that took place at Cademuir Hill in 1849 or 1850, and it is said that Mrs. Gardner was made the subject of a violent rape or attack upon her, and that this child was the result of that. My noble and learned friend the Lord Chancellor has stated, I think, with very great clearness, that in such a case as this it is absolutely necessary that the statement which is placed before the court, and attempted to be supported by evidence, should be of a very clear, distinct, and consistent *character. Now, tested by that
741] consideration, I cannot say that the statements which were made in the first instance by Mrs. Gardner to Mr. Gardner, or even those placed on the record, are of that character. I think that it is not possible to read Mrs. Gardner's evidence or Mr. Gardner's evidence so as to show that there was

(1) Fourth Series, vol. iii, p. 721.

a satisfactory account given to him of the occurrence to which I have referred. Then we come to this, that the case is attempted to be made out by statements and by evidence which are not consistent, and which are contradictory to one another, and that really it is not a reasonable statement or attempt to prove the case of the pursuer; and upon that ground I venture to think that your Lordships are quite right in coming to the conclusion which you have arrived at.

I am sensible that very great care has been bestowed, not only by the court below, but by your Lordships, in the consideration of this very extraordinary case, because it is extraordinary in this respect, that the husband and the wife concur in the statements which tend to repudiate responsibility for this child. I venture to differ from my noble and learned friend who spoke last (Lord Blackburn) with reference to the perhaps rather strong terms in which he appeared to express himself as regards the import and effect of the evidence of these witnesses. As to Mr. Gardner, I have an impression that he did conscientiously believe that Mrs. Gardner had upon the whole made a disclosure to him of the position in which she was placed, although, looking back upon it afterwards, it does appear incredible to us. But I would rather place the case upon this, as the court below have done, that this is a case in which the pursuer has failed to prove that he is not the father of Mary Gardner. The judges below express hesitation—Lord Gifford in particular, whose judgment has been quoted with such approval, both with reference to the statements in point of law, and also with reference to the evidence in the case, says that he looks upon it as a case of very great difficulty, and that he has arrived at the result after very great hesitation. His Lordship says:

It is only with great hesitation, and after very anxious consideration, that I have come to concur in the opinion now expressed by all your Lordships.

*But I think that having regard to the very serious [742 consideration it has received in the court below and before your Lordships, especially after the able pleadings which we have heard from both sides, your Lordships can have no hesitation whatever in approving of the judgment which has been proposed by my noble and learned friend the Lord Chancellor.

Interlocutor complained of affirmed, and appeal dismissed with costs.

Agents for the appellants: *Grahames & Wardlaw.* *

Agents for the respondents: *Ashurst, Morris, Crisp & Co.*

C A S E S
DETERMINED BY THE
QUEEN'S BENCH DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE QUEEN'S BENCH DIVISION,
AND BY THE
COURT FOR CROWN CASES RESERVED,
X L V I C T O R I A.

[2 Queen's Bench Division, 157.]

Nov. 18, 1876.

[CROWN CASES RESERVED.]

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*THE QUEEN V. TATLOCK.

Misappropriation by Agent—24 & 25 Vict. c. 96, s. 75.

The prisoner was indicted under the second branch of 24 & 25 Vict. c. 96, s. 75, for that he being intrusted, as a broker, attorney, or agent, with valuable securities for a special purpose, without authority to sell, negotiate, transfer, or pledge them, unlawfully and contrary to the purpose for which the securities were intrusted, converted to his own use a part of the proceeds. The facts proved were as follows: The prisoner was an insurance broker, and had, as such, effected insurances on a ship for the prosecutor; and the ship having been lost, the prosecutor sent him the policies, three in number, one with the A. office, one with the I. office, and one with underwriters, with other documents necessary for recovering the loss. On the 17th of December, the prisoner received the amount of the I. office's policy, and on the 31st of December, the amount of the A. office's policy. Each amount was paid him by a check to his own order, which in each case he paid into his own bank to his own credit. The prisoner did not pay over to the prosecutor any of the money so received by him; but, being pressed for it, gave various excuses for not doing so. On the 27th of January following, he filed a petition for liquidation; and his balance at his bank was then much less than the sum received on the policies. The prisoner having been convicted on these facts;

Held (by Cockburn, C.J., Kelly, C.B., Bramwell and Amphlett, JJ.A., Pollock, B., and Field, J.), that the conviction was wrong.

By Cockburn, C.J., on the ground that, even assuming the prisoner could have been properly convicted if there had been evidence that the prisoner had received the money with the intention of embezzling it, in the absence of such evidence and a finding to that effect, he could not be convicted.

By Kelly, C.B., and Pollock, B., on the ground that, in the absence of evidence of the previous course of dealing between the parties, and of what the duty of the prisoner was as to handing over or accounting for the money received, the conviction could not be upheld.

By Bramwell and Amphlett, JJ.A., and Field, J., on the ground that the branch of the section in question applies only to the case of an agent, intrusted with securities without authority to obtain money upon them, who wrongfully appropriates the securities, or wrongfully obtains money upon them and appropriates the money; following *Reg. v. Cooper* (Law Rep., 2 C. C., 123).

CASE reserved by a learned commissioner sitting at the Old Bailey.

At the session of the Central Criminal Court, held on Monday, the 21st of February, 1876, the prisoner was tried upon an indictment, the second count of which was founded on the second branch of the 75th section of the statute 24 & 25 Vict. c. 96, and was as follows:—

*2d count. And the jurors, &c., that the said [158 William Ananias Crage, trading under the style and firm of Overall, Sons & Co., heretofore, to wit, on the 27th day of November, 1875, within the jurisdiction of the said Central Criminal Court, did intrust the said William Thomas Augustus Tatlock, as his broker, attorney, and agent, with certain valuable securities, to wit, two policies of insurance for £650 and £500 respectively for a special purpose, that is to say, that he, the said W. T. A. Tatlock, should receive the said sums of £650 and £500, which were then due and payable on the said policies of insurances, and forthwith pay over to the said W. A. Crage the sum of £1,138 10s., without any authority to him, the said W. T. A. Tatlock, to sell, negotiate, transfer, or pledge the said valuable securities. And the jurors aforesaid, upon their oath aforesaid, do say that the said W. T. A. Tatlock, being a broker, attorney, and agent as aforesaid, on the day and year aforesaid, and within the jurisdiction aforesaid, in violation of good faith and contrary to the said object and purpose for which the said valuable securities were intrusted to the said W. T. A. Tatlock as aforesaid, unlawfully did convert to his own use and benefit a certain part of the proceeds of the said valuable securities, to wit, the said sum of £1,138 10s., contrary to the form of the statute, &c., and against the peace, &c.

The facts adduced in evidence were these:—

The prisoner was an insurance broker in the city of Lon-

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don, trading as "Tatlock Brothers," and in November, 1875, was employed by W. A. Crag (trading under the style of S. Overall, Sons & Co.) to effect for him (Crag) an insurance on the cargo of a ship called the Agatha, to the extent of £1,650. The prisoner was to pay the necessary premium. He delivered to Crag the following memorandum:—

"Tatlock Brothers, London, November 17, 1875.

To Messrs. Overall, Sons & Co.

Dr. to Insurance for £1,650 on Agatha at 30/

per cent.	24	15	0
Duty	0	4	3

24 19 3

Less 10 per cent. discount for cash on £23 10 3	2	7	0
---	---	---	---

£22 12 3

Tatlock Brothers."

159] *On the 27th of November, prisoner was at Crag's counting-house, and Crag's clerk said to him, "By-the-bye, Mr. Tatlock, we have an account due to you" (alluding to the above). Prisoner replied, "Oh, never mind that, I shall have to give you a check presently." The loss of the Agatha was by this time known. The clerk in consequence of this statement by the prisoner did not give him a check for the amount of the premium. On the 27th of November, 1875, Crag having heard of the loss of the Agatha, gave the prisoner directions to obtain the money on the policies, and wrote to him as follows:—

"London, November 27, 1875.

"102 Lower Thames Street.

"Gentlemen,—Herewith we hand you the necessary documents for recovering the amount insured on Agatha, Lerwick, and list of same, which please sign and return to bearer.

We are, gentlemen, yours truly,

"S. Overall, Sons & Co.

"Messrs. Tatlock Brothers."

With that letter Crag sent to prisoner and prisoner received three policies of insurance for the sums of £650, in the Archangel office, £500 in the Imperial office, and £500 by underwriters, the captain's protest and bill of lading, and a letter from Lloyd's agent.

On the 17th of December the prisoner received from the Imperial office the £500 on their policy by a check payable to his order, and he paid that check into his own bank,

the Union, to his own credit, and it was cashed and credited to him.

On the 31st of December the prisoner received from the Archangel office the £650 on their policy by a check payable to his order, and he paid that check into his own bank to his own credit, and it was cashed and credited to him.

On the 11th of January, 1876, prisoner wrote and sent to Crage the following memorandum:—

“London, January 10, 1876.

“From Tatlock Brothers.

Cr.

By total loss per Agatha	£1,650	0	0
Less commission receiving	16	10	0
	1,633	10	0

*Due the 17th of January, 1876.

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Subject to payment by underwriter.

“Tatlock Brothers.

“To Messrs. S. Overall, Sons & Co.”

Crage called on prisoner twice for the money, and the prisoner said it was not due until the 17th of January. Again, on the 18th, Crage called upon him and asked for the money, and prisoner said he could not let him have it at present, but should be able to let him have it on Saturday, or some of it.

On the 19th prisoner went to Crage and said he could not get the money till Saturday, and would let Crage know on the following Thursday how much he (prisoner) could get by Saturday. On the 20th of January prisoner wrote and sent to Crage the following memorandum:—

“London, January 20, 1876..

“From Tatlock Brothers.

“Dear Sir,—

Agatha.

“We fear that we shall be unable to exceed £1,000 upon the loss per the above-named vessel on Saturday next.

“Yours truly, Tatlock Brothers.

“To Messrs. S. Overall, Sons & Co.”

Upon receipt of that memorandum Crage called upon prisoner for the money, who said, “It would be impossible for a broker to carry on his business if he had to pay immediately.” Crage replied, “Having had the money, as I presume you have, you should pay it at once. You have no business to withhold it. Let me see the policies.” Prisoner thereupon went to a safe and rummaged it, and then said, “I have not the policies, the office has kept them.” Crage

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replied, "The office would not have kept them unless they had paid for them." The prisoner said, "Two of the offices have settled with me in account," and the prisoner then handed to Crage one of the three, namely, the underwriters' policy for £500, and Crage himself obtained the money on that policy.

The prisoner never paid Crage any money, and on the 27th of January, 1876, he filed his petition for liquidation with a statement of debts, £2,500, and returned Crage as a creditor for £1,112 5s. 11d. The trustee under the prisoner's liquidation received the balance (about £600) standing [61] to the credit of the *prisoner at the Union Bank, and five creditors only have proved under the liquidation. The prisoner's discharge under the liquidation was granted. Mr. Crage did not prove, and repudiated the liquidation altogether.

It was contended by Mr. *Straight*, on behalf of the prisoner, that the facts as proved did not show the prisoner to have committed the offence mentioned in the statute, and that the commissioner ought so to tell the jury. He, however, laid the facts before the jury, and asked them the following questions :

1. Did Crage intrust the prisoner with the two policies of insurance?

2. Did he intrust him with them for a special purpose?

3. Was that special purpose that he should receive the moneys and forthwith pay over the moneys when received to Crage?

4. Had the prisoner any authority to sell, negotiate, transfer, or pledge them?

5. Did he, in violation of good faith and contrary to the purpose for which they were intrusted to him, convert any part of the proceeds to his own use?

The jury answered questions 1, 2, 3 and 5 in the affirmative, and No. 4 in the negative, and under the commissioner's direction they found the prisoner guilty, and the verdict was so recorded.

The question reserved for the consideration of the court above was, whether the facts as proved were sufficient to constitute the offence mentioned in the statute, or whether the learned commissioner ought to have directed the jury to find a verdict of not guilty.

May 27. The case was argued before Kelly, C.B., Quain, Archibald and Field, JJ., and Pollock, B., by *Straight* for the prisoner and *Tickell* for the prosecution.

June 24. The case was reargued before Cockburn, C.J., Kelly, C.B., Bramwell, Pollock and Amphlett, BB., Archibald and Field, JJ., by *Straight*, for the prisoner, and *Besley* (*Tickell* with him), for the prosecution. *Reg v. Cooper* ⁽¹⁾ was cited. The arguments sufficiently appear from the judgments.

Cur. adv. vult.

*Nov. 18. The following judgments were delivered: [162

COCKBURN, C.J.: The defendant was indicted under the 75th section of 24 & 25 Vict. c. 96. The facts were as follows: Having negotiated, as broker, certain policies of insurance on a ship belonging to the prosecutor, and the ship having been lost, the defendant was intrusted with the policies for the purposes of collecting the amounts due upon them. These he received in checks to his own order, which he indorsed and paid into his own bankers, to his own credit; but he failed, either then or at any time afterwards, to pay the amount to the prosecutor, and two months later filed a petition for liquidation. The jury, in answer to questions specifically put to them by the learned commissioner before whom the case was tried, found expressly that the prisoner was intrusted with the policies for a special purpose, namely, that he should receive, and when received forthwith pay over the moneys to the prosecutors. They further found that the prisoner had no authority to sell, negotiate, transfer, or pledge the policies; and that, in violation of good faith, and contrary to the purpose for which they were intrusted to him, he converted the proceeds to his own use. Upon which they were directed by the learned commissioner to find the prisoner guilty. The question submitted to us is, whether the facts as proved were sufficient to constitute the offence mentioned in the statute, or whether the jury should have been directed to find a verdict of not guilty.

It appears to me plain that there has been a miscarriage in this case. But I scarcely know in what position we are placed as to the decision we can pronounce; whether our opinion is asked upon the facts as found by the jury, or on the facts as proved by the evidence; it being to my mind perfectly plain, not only that the right questions have not been put to the jury, but also that their answers to the questions as put are directly contrary to the evidence. The proper remedy would be for a new trial; but that we have no authority to direct. I think, however, that the form in which the question is put leaves it open to say whether the

(1) Law Rep., 2 C. C., 123.

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learned commissioner, instead of putting any questions to the jury, should not, upon the evidence, have directed them to acquit the prisoner; and this, I think, would have been the proper course, the evidence being, in my opinion, insufficient to warrant a conviction.

[163] *The case turns on the construction of the second branch of the section referred to, which enacts that "who-soever having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel, or valuable security, or any power of attorney, for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or of any foreign state, or in any stock or fund of any body corporate, company, or society for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or to the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor."

I entertain very serious doubt whether a policy of insurance comes within this section. The term "chattel" is intended, I think, to apply to objects which can be sold, bartered, or pledged; and a policy of insurance cannot be said to be a "valuable security," any more than a contract of sale or any other contract. It is simply a contract whereby, in consideration of a premium, one party insures another against a given loss. Unless the loss occurs nothing is payable. A valuable security is one on which money is payable irrespective of any contingency. Moreover, a policy of insurance upon which money is received is neither "sold," "negotiated," "transferred," nor "pledged," in any sense of the word. The money due on it is paid, and the contract comes to an end, just as when money is paid on a contract of sale.

I likewise entertain very serious doubts whether this enactment extends to a case in which a person intrusted with any of the instruments enumerated in the section, for the purpose of disposing of it, or receiving money on it, having done so, embezzles the proceeds. The enactment, if the

words are carefully followed, appears to me to apply solely to the dealing with securities without authority, and contrary to the purpose for which they were intrusted, and *in so doing converting the instrument, or the pro- [164] ceeds of it, to the use of the party so violating his trust. But here, the party uses the instrument for the very purpose for which it was intrusted to him, namely, that of receiving the money due on it. Let us assume, for the purpose of the argument, that he afterwards embezzles the money. He still cannot be said to have dealt with the policy "without authority," which, by the express terms of the statute, is an essential element of the offence.

It may, however, be said that, if an instrument is intrusted to a person for the purpose of his receiving money upon it and handing over the money so received to the principal, he receives it for a "special purpose;" and that if the agent receives such money with the intention of applying it to his own use, instead of handing it over to the person employing him—the authority being vitiated by the intended fraud—he is acting without authority, as well as in violation of good faith.

Assuming this to be so, and that a party receiving money on an instrument intrusted to him for the special purpose of his receiving the money due upon it, and forthwith handing such money over in specie, and who, at the time he receives the money intends, in violation of good faith, to apply it to his own use, commits the offence created by the statute. I doubt exceedingly whether that would be so, where, the money having been received with an honest intention, the fraudulent design of misappropriating it afterwards arose. If this doubt be well founded, it would be a question for the jury, whether the defendant, at the time he received the money, intended to appropriate it to his own purposes—a question which was not submitted to the jury in the present case.

At all events, it is to my mind perfectly clear that unless there was, at the time the money was received, the fraudulent intention of keeping the money, in which case the statute may possibly apply, it cannot apply to a case in which, by the understanding of the parties, the person receiving the money is not to hand it over at once to the principal, but is to carry it to an account between them, and to pay it only in settlement of such account. That such was the understanding between the prosecutors and the defendants—whether as arising from the general custom of trade, *as between the insurance brokers and their princi- [165]

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pals, or from the course of dealing between these immediate parties,—appears to me to result from the evidence. No evidence having been given as to any general custom, I do not think we are at liberty to take notice of the statement of such a custom occurring in any work on insurance law, but sufficient evidence of the understanding between the parties is to be found in the fact that when the defendant is applied to for the money received on the policies, he answers, while acknowledging the receipt, that it will not be due to the prosecutor for a month, and this is acquiesced in, affording, as it seems to me, at all events *prima facie*—and no evidence was offered on the part of the prosecution to rebut the presumption—good ground to infer that the defendant, either by the custom of business, or the course of dealing between himself and his principals, was entitled, instead of paying over the money at once, to hold it and treat it as his own for a time, settling for it only in account when the time for settlement came. If such were not the terms on which the defendant was employed, it was for the prosecution to rebut the inference which arises from the facts I have referred to.

Assuming such a case to be within the statute, it would be a question for the jury whether the defendant, at the time the money was received, intended to embezzle it. Possibly proof that a party receiving money under such circumstances was, and knew himself to be, hopelessly insolvent, and, being aware that his account at his bankers was heavily overdrawn, paid the money in to the credit of his account, knowing that the effect of his so doing would be that it would be totally lost to the party entitled to it, might be sufficient evidence of an intention to convert the proceeds to his own use, although under other circumstances the payment of the money into his bankers might have been perfectly legitimate. But the only evidence of insolvency in the present case was that, two months after the receipt of the money, the defendant filed a petition for liquidation. At the time he received it he may have been solvent. It was for the prosecution to give evidence as to the state of his circumstances, if it could be shown that he was insolvent when the money was received, so as to raise the inference that, in paying it into his bankers, he intended [66] to *defraud the prosecutor of the amount. No such evidence having been given, I think that, even supposing the case to be within the statute, as to which I entertain great doubt, the learned commissioner should have held that there was no case to go to the jury, and should have directed

an acquittal. I am therefore of opinion that the conviction was wrong, and should be quashed.

KELLY, C.B.: I think it is so far doubtful whether a marine policy of insurance, upon which a loss has occurred and a sum of money has become payable, is a chattel or a valuable security within the meaning of the 75th section of the act, that I do not feel justified in dissenting from the judgment of acquittal upon which the other members of the court have agreed. In addition, however, to the judgment of Baron Pollock, in which I entirely concur, I would observe that I cannot accede to the doctrine that because a man, whose duty it is to pay over a sum of money to another, pays it into his bankers, and afterwards draws it out by check, and then goes into liquidation or becomes bankrupt, he may not have been guilty of a criminal offence within this statute, or of what, under other circumstances, would have amounted to embezzlement. It appears to me that if the prisoner, after he had received the money and ought to have paid it to the prosecutor, and after paying it into his bankers, drew it out again, knowing that he was insolvent, and applied it to his own uses, knowing that he could never make it good, he was guilty of fraudulently converting the proceeds of the policy to his own use within the meaning of the statute, and that if the policy had clearly been a chattel within the statute, the conviction would have been right; but, for the reasons already stated, I agree that it should be quashed.

AMPHLETT, B.: I am of opinion that the conviction must be quashed.

The indictment is framed upon the second branch of the 75th section of 24 & 25 Vict. c. 96, and the case alleged against the defendant is, that, being intrusted as a broker with certain ship policies, for the special purpose of receiving the moneys due thereon and paying over the same forthwith to the prosecutor, he fraudulently converted the same to his own use.

*Now, looking at both branches of the section, which [167 we ought to do, for the purpose of arriving at the true meaning of either, it appears to me that the second branch only deals with the case of chattels and securities, sold or converted into money without authority, and does not embrace in its provisions policies like these, which were intrusted to the defendant for collection.

For we must observe that the section only relates to certain classes of agents whom the Legislature has not thought fit to make amenable to the ordinary law of embezzlement,

and it is only, therefore, under defined conditions and safeguards that such agents can be proceeded against criminally for misappropriating moneys or securities intrusted to them.

The general scheme appears to be this.

If moneys, or securities which they are authorized to convert into money, are intrusted to agents of this character, they are only answerable criminally for a fraudulent misappropriation, if a direction in writing as to the disposal of such moneys was given. That is provided for by the first branch of the section which embraces the case we are considering, for I cannot doubt, having regard to the interpretation clause, that the policies were securities for the payment of money within the meaning of the section.

There remained the case (which was supposed to require the protection of the criminal law) of chattels or securities intrusted to such agents for safe custody, or for some special purpose, without authority to sell or convert into money, and that is provided for by the second branch of the section, which makes such agents criminally liable for a fraudulent misappropriation of such last-mentioned chattels or securities, or of the proceeds of the same. It has been argued that these last words can have no meaning unless they are held to refer to securities other than those which they had no authority to convert into money.

I think this is a mistake. These words are not to be found in the first act (52 Geo. 3, c. 63) on this subject, but were inserted in the subsequent acts for the obvious purpose, as it appears to me, of meeting the case, which may well happen, of such agent selling, or at all events alleging that he had sold, honestly, though without authority and afterwards yielding to temptation, and fraudulently converting [168] the proceeds to his own use. Without these *words the agent in such a case would escape, or it might, at all events, be more difficult to convict him.

The irrational consequences that might occur if securities dealt with by the first were also held to be comprised in the second branch of the section, are numerous, and, as it appears to me, afford a strong argument that it was not so intended by the Legislature. For instance, if you gave such an agent money for a particular purpose, but not expressed in writing, he would not be criminally responsible, but if you had given him a check, and told him verbally to get it cashed and apply the proceeds in the same way, he would. What is the sense or meaning of such a distinction? Is he not, as soon as he cashes the check, intrusted with the

amount exactly in the same way as if it had been handed over to him directly by his principal?

Again, it is admitted on all hands that if a debenture or other security be intrusted to a broker with authority to sell, negotiate, transfer, or pledge, the case would not be within the second branch of the section; and that, in the absence of a written direction as to the disposal of the proceeds, he would be civilly only, and not criminally, responsible; but, according to the argument, if the security were intrusted to him for the purpose of collecting the money due upon it, he would be criminally responsible for the misapplication of the proceeds. I confess I cannot see any reason why he should be criminally responsible in one case but not in the other.

It is certainly difficult to bring a broker so authorized to collect moneys due on a security within the description of an agent authorized to sell, negotiate, transfer or pledge, although I think there is little doubt but that the framers of the section, by the use of the latter words, imagined that they had exhausted every means of converting securities into money. I do not, however, think it necessary to deal with that difficulty, since my judgment is based not upon subtleties of language, but upon the broad ground that, according to the true construction of the section, cases which, if there had been a written direction, would have fallen within the first branch, do not, in the absence of such written direction, fall within the second branch of the section. In fact, I think that the cardinal principle of the section is that such an agent is only (in *the absence [169 of a written direction) to be criminally responsible for moneys which may come into his hands by some unauthorized act of his own.

This construction of the section was adopted and formed the ground of an unanimous decision of the Court of Appeal, consisting of five judges, in *Reg. v. Cooper* ('), and I think we are bound by that authority, even if it be the fact, as is alleged, that there was another ground, unnoticed by the counsel who argued or the judges who decided that case, which might have supported the decision.

Upon the other point argued before us, as to the sufficiency of the evidence, in point of fact, to support the conviction, I will only say that I find it very difficult to understand what, if anything, the learned judge has referred to us beyond the legal question on which I have already expressed my opinion. If he meant to ask us whether the

(') Law Rep., 2 C. C., 123.

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facts stated in the case justified the findings of the jury, I should say they did not, for I can find in the facts, as stated, no evidence at all of the special purpose stated in the indictment, and consequently none of the alleged conversion.

BRAMWELL, B.: I am of opinion for the reasons given in Sir R. Amphlett's judgment, that these policies were not valuable securities intrusted to the prisoner for a special purpose within the meaning of the second part of s. 75, but were securities for money within the first part of the section, and were intrusted to the prisoner for such purpose as to make the case within the first part had there been a direction in writing. As there was none the conviction cannot be sustained.

POLLOCK, B.: In so far as the decision of this case depends upon the proper construction to be put upon the section of the statute under which the prisoner was indicted, the 24 & 25 Vict. c. 96, s. 75, I entertained during the argument, and still entertain, considerable doubt. I have had, however, the advantage of seeing the judgments which have been prepared by my learned Brethren, and thinking, as I do, that the conviction was unsatisfactory, for reasons to which I will presently refer, I am not prepared to differ [170] *with the view which has been taken by the majority of the court upon the construction of a statute which is undoubtedly capable of more than one interpretation. If it could be assumed that the construction of the statute which was insisted upon by the prosecution was correct, it appears to me that, having reference to the duty of the prisoner to pay over to the prosecutor the sums of money which he had received in payment of the policies, and also to the false statement made by the prisoner to the prosecutor after he had received these sums, there may have been evidence which might and ought to have been submitted to the jury with a view to their finding whether or no the prisoner, who undoubtedly had received the money, "converted it to his own use or benefit" within the meaning of the statute. But the prisoner was not a mere clerk of the prosecutor; he was an insurance broker carrying on an independent business, and it must be assumed that he had many other principals for whom he acted besides the prosecutor, and it does not appear what had been the previous course of dealing between the prosecutor and the prisoner as to the payment or accounting by the latter for money received by him on the settlement of losses. These are matters having an essential bearing upon the guilt or innocence of the prisoner, and yet they do not appear to have been explained by the evi-

dence or brought to the attention of the jury, who, by their answer to the third question, appear to have assumed that the duty of the prisoner was to pay over the money forthwith, without having their attention called to, or having entered on the consideration of, the facts from which such a duty could be properly inferred. Under these circumstances, when I have to answer the question which has been submitted to us by the learned commissioner, I cannot say that I consider that the facts, as proved, were sufficient to constitute the offence mentioned in the statute, and therefore, in my judgment, the conviction should be quashed.

Conviction quashed.

Solicitors for prosecution: *Beard & Son.*

Solicitor for prisoner: *H. Montagu.*

See 12 Eng. Rep., 643 note; 14 Eng. Rep., 645 note; *Regina v. Oxenham*, 15 Eng. Rep., 373; *State v. New*, 22 Minn., 76; 2 Bish. Cr. Law (6th ed.), §§ 331-351.

Defendant D., by the representation that defendants, who were sugar brokers, had made sales of sugars upon terms proposed by plaintiff, induced it to ship the sugars to the purchasers and to send to defendants the invoices of bills of lading, they undertaking to collect and pay over the proceeds of sales. Defendants, in fact, had made sales upon different terms. They made out new invoices in defendants' firm name, received the proceeds and refused to pay them over. Held, that the transaction was, in effect, the same as if plaintiff had intrusted defendants with possession of the sugars, with authority to sell and collect the price, and they, therefore, occupied the position of factors, not of brokers; and that in a *civil action* to recover the proceeds of the sale, an order of arrest was proper, either under the provisions of the Code (§ 179, sub. 2) authorizing an arrest in an action for moneys received in a fiduciary capacity, or that authorizing it when the debt sub. 4) was fraudulently contracted: *Standard, etc., v. Dayton*, 70 N. Y., 486; *Slott v. King*, 8 How. Pr., 298; *Duguid v. Edwards*, 50 Barb., 288; *Church, etc., v. Crawford*, 14 Abb., N.S., 200; *Johnson v. Whitman*, 10 Abb., N.S., 111; *Roberts v. Prosser*, 53 N. Y., 260; *Scudder v. Shiels*, 17 How. Pr., 420; *Ostell v. Brough*, 24 How., 274; *Frost v. McCarger*, 14

How. Prac., 131; *Barrett v. Gracie*, 34 Barb., 20; *Holbrook v. Horner*, 6 How. Pr., 86; *Turner v. Thompson*, 2 Abb. Prac., 444; *Gibbs v. Hickborn*, 12 Hun, 480; *Kelly v. Scripture*, 9 Hun, 283; *Obregon v. Mier*, 52 How., 356.

See *Morange v. Waldron*, 6 Hun, 529; *Wood v. Henry*, 40 N. Y., 124; *Liddell v. Paton*, 7 Hun, 195, dismissed, 67 N. Y., 393; *Owsley v. Cobia*, 15 Bankr. Reg., 489; *F. & N. Bank v. Sprague*, 52 N. Y., 605; *German Bank v. Edwards*, 53 N. Y., 541; *Obregon v. Mier*, 54 How., 390.

Where a broker or agent receives money or check for property belonging to another, the owner may follow the money or the check, or its proceeds: *Matter of Cooke*, 19 N. Y., 714, 719 note; *Converseville, etc., v. Chambersburg, etc.*, 7 N. Y. Weekly Dig., 207.

If money is placed in the hands of a person to be loaned for the owner for a specified time, upon a certain specified character of security, and at a stipulated rate of interest, and the person so intrusted with the money fraudulently converts the same to his own use, he is guilty of embezzlement under the Illinois Criminal Code.

But where one places his money in the hands of another, relying upon his honesty or responsibility for its return, with the stipulated interest, then a failure of the party to properly account for the money so received will not subject him to a criminal prosecution for embezzlement: *Kribs v. State*, 82 Ills., 425, 1 Chicago L. J., 24.

Where a party charged with embezzlement was, at the time of committing

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the offence, in the actual employment of the person or corporation whose property was embezzled, it matters not whether he was directly hired by that person or corporation, or not. If he was employed for such person or corporation, and, by virtue of such employment, received the money and embezzled it, he may be convicted: *Com. v. Hill*, 5 Luzerne Legal Register, 241.

243-8, and cases cited; 2 Bish. Cr. Law, (6th ed.), §§ 340, 345.

As to form of indictment where several sums, from day to day are embezzled, see *Com. v. Hill*, 5 Luzerne Legal Register, 242; *Reg. v. Purchase*, 1 Car. & Marshman, 617; *Rex v. Williams*, 6 C. & P., 626; *Reg. v. Nocke*, 2 Car. & Kirw., 620; *Rex v. Petrie*, 1 Leach, 294; *Reg. v. Williams*, 9 Cox's Cr. Cas., 338; *Scarver v. State*, 53 Miss., 407.

[2 Queen's Bench Division, 171.]

Jan. 11, 1877.

[IN THE COURT OF APPEAL.]

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*BAKER V. OAKES.

Pratice—Costs—Jurisdiction of Judge who tried Action—Judge at Chambers—Order LV; Order LVII, Rule 6—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 89.

By Order LV, where an action is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the judge before whom such action is tried or the court shall otherwise order. By Order LVII, Rule 6, a court or a judge shall have power to enlarge the time appointed by these rules for doing any act. By s. 89 of the Judicature Act, 1873, any judge of the High Court may exercise any jurisdiction of the court exercised before the act by a judge at chambers. A jury returned a verdict for a small amount beyond a sum paid into court; no application as to costs was made at the trial; but some time afterwards the judge who tried the action, sitting at chambers, made an order depriving the plaintiff of costs from the time of the payment into court. On appeal, the Divisional Court set aside the order for want of jurisdiction. On appeal to the Court of Appeal:

Held, that the judge had no jurisdiction: Either, 1. As the judge who tried the action, because no application had been made at the trial as required by Order LV; and Order LVII, Rule 6, did not apply to the case. Or, 2. As the judge at chambers, because Order LV expressly confined the power to the court, and s. 89 did not apply, as no such power existed before the act.

THIS action was brought for £127 15s., consisting of three items of claim, £61 15s. and interest, £6, and £60. As to the first item, the defendant paid £62 10s. into court, which plaintiff took out in satisfaction, never indebted being pleaded to the rest. At the trial before Huddleston, B., on the 1st of August, 1876, the defendant succeeded as to the item of £60, but upon the item of claim of £6, the plaintiff obtained a verdict for £4 6s., made up of two items of £2 7s. and £1 19s. At the trial nothing was said as to costs.

A stay of execution was obtained, and application was made to the court on the 5th of November for a new trial on an affidavit setting out the following facts: A few days after the trial a witness for the plaintiff, who had sworn at the trial that the £2 7s. was still owing, discovered, on examining the accounts, that it had been paid, and wrote to

the defendant to that effect. The form of particulars had misled the defendant as to the other item of £1 19s., or *he would have been prepared at the trial to prove [172 the payment of that also, or have paid the amount into court.

The court refused the application on the ground of the small amount, but suggested that an application might be made as to costs.

An application, on the same affidavit, was accordingly made to a judge at chambers, which was referred to Huddleston, B.; and he made an order on the 15th of November that "plaintiff's costs subsequent to the payment into court by the defendant be borne by the plaintiff," subject to appeal to a Divisional Court of the Queen's Bench Division, as to the question of jurisdiction.

Nov. 29. KELLY, C.B., and CLEASBY, B., sitting as the Queen's Bench Division, rescinded the order, on the ground that Huddleston, B., had no jurisdiction either as the judge who tried the action or as a judge at chambers.

The defendant appealed.

Fullarton, for the defendant: Costs in all cases are now regulated by Order LV. "Subject to the provisions of the act, the costs of, and incident to, all proceedings in the High Court shall be in the discretion of the court. . . . Provided that when any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried or the court shall otherwise order." First, Huddleston, B., had jurisdiction to make the order as the judge who tried the action; no application was made at the trial, and no application could have been made, for the materials for the application were not then in the possession of the defendant: but Order LVII, Rule 6, enables the court or a judge to enlarge the time appointed by the rules for doing an act or taking any proceeding, and here it must be taken that by making the order the judge at the same time enlarged the time.

[COCKBURN, C.J.: "To enlarge the time." No time is fixed by Order LV, within which the application as to costs is to be made; it is to be made "at the trial." Order LVII, Rule 6, does not apply to such a case.]

Secondly, Huddleston, B., had jurisdiction as a judge at chambers; "or the court," in Order LV, includes a judge at chambers.

*[BRETT, J.A.: On the contrary, the omission of [173

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“or a judge” was designedly intended to confine the jurisdiction to the court, who alone should have power, if the judge at the trial made no order, to deprive a successful party of what was otherwise his absolute right to costs.]

Sect. 39 of the Judicature Act, 1873, at all events, gives the power to a judge at chambers, as by that section a judge of the High Court is to exercise all the powers hitherto exercised by a judge at chambers. Lastly, if the court should be of opinion that the judge had no jurisdiction, they will themselves make the order which the justice of the case requires. Or they can give him relief under Order XLII, Rule 22.

Geary, for the plaintiff, was not called upon.

COCKBURN, C.J.: I am of opinion that this appeal must be dismissed. The Judicature Acts, and the orders made under them, deal, amongst other things, with the subject of costs incidental to proceedings in an action up to the trial and the returning of a verdict by the jury. By Order LV, provision is made that, as a general rule, on a trial by jury, costs shall follow the event, but it is to be in the power of the judge, on application made at the trial, to make any order as to costs which he may think proper, where, in his opinion, the circumstances justify a departure from the general rule. There is also power given to the court to make an order to deprive a successful party of his costs, to which he would otherwise be entitled by the event of the trial. The question is, whether either of these two courses has been pursued by the defendant, the party who was unsuccessful and did not get the verdict to which he may possibly have been entitled. Unfortunately a witness, by mistake, made a statement as to one item (of £2 7s.), which, being uncontradicted, justified the jury in finding that sum to be still due from the defendant to the plaintiff. The witness has since discovered his mistake, and informed the defendant of it, and the result is that, as to this item, the verdict clearly ought to have been for the defendant. There is also another item (of £1 19s.), as to which the defendant was misled by the particulars. There were, therefore, good grounds for a new trial, had these items been of sufficient [74] amount; but the Court of *Queen's Bench, acting on the usual rule, refused the application on the ground that the amount involved was too small. What, under these circumstances, should the defendant have done? He had omitted to make any application as to costs to the judge at the trial, but it was still open to him to have applied to the court. Unfortunately that course was not pursued, but a

summons was taken out before a judge at chambers, and the judge referred the matter to Baron Huddleston, who had been the presiding judge at the trial. No application, however, had been made to him at the trial, and consequently I am clearly of opinion that Baron Huddleston, as the judge at *nisi prius*, had no jurisdiction, but was *functus officio* at the time he made this order.

Secondly, had the learned Baron jurisdiction as a judge representing the court? It may be taken that he was acting as a judge at chambers, but I am clearly of opinion that, as such, he had no such power; for Order LV only gives the power to the judge at the trial or to the court. The application to the Queen's Bench Division was not made under Order LV, but was only by way of appeal from the order of Baron Huddleston, and the judges acting for the Queen's Bench Division were right in saying that the order was *ultra vires*. If the application had been to the court itself, I think there can be no doubt it would have had power to deal with the costs. But the question we have now to decide is, whether that order of the court, rescinding the original order as made without jurisdiction, was right, and we have no power to deal with this case as if we were a court of first instance. All we can say is, that the order of the Queen's Bench Division was right, but without prejudice to any original application to the Queen's Bench Division under Order LV.

Sect. 39 of the act of 1873 was relied on for the defendant, but it cannot apply to the present case, for Order LV, which it is admitted is the order which governs the case, gives jurisdiction only to the judge at the trial, or to "the court," without the alternative "or a judge." It is clearly, therefore, not a case in which it was intended to give jurisdiction to a judge at chambers. In all the other sections or orders in which the intention is to give jurisdiction to a judge at chambers, the power is given to the court or a judge; but Order LV is express that the power shall be exercised only *by the judge at *nisi prius* or by the court. The [175 Divisional Court, therefore, may have jurisdiction to make an order; but the order of Baron Huddleston was clearly without jurisdiction, and the appeal fails, and must be dismissed with costs.

BRETT, J.A.: In this case there had been a trial before a jury, and a verdict was returned for the plaintiff for a small amount; the motion for a new trial was refused, and as to that there was no appeal. We must, therefore, deal with the case as though the verdict was rightly entered for the

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plaintiff, though for a small amount. Some time after the trial, application was made to Baron Huddleston, at chambers, on an affidavit of circumstances which had come to the knowledge of the plaintiff since the trial; and Baron Huddleston made an order depriving the plaintiff of costs from the time of the payment into court. It is suggested that the judge had jurisdiction in one of two ways: either as the judge who tried the action, or as a judge at chambers representing the court. I think he had not jurisdiction in either capacity. First, it is said he had jurisdiction because he was the judge who tried the action; but the right to costs depends entirely on Order LV, which, under ordinary circumstances on a trial by a jury, gives costs affirmatively and generally to the successful party, "the costs shall follow the event." But then the order goes on, "unless, upon application made at the trial, for good cause shown the judge before whom such action is tried or the court otherwise order." I am clearly of opinion that the case is not brought within that proviso; no application was made at the trial, and therefore the judge could not make the order, a condition precedent to giving him jurisdiction not having been fulfilled. But it was said he could make the order by virtue of Rule 6 of Order LVII, which gives power to a court or a judge to enlarge the time appointed by the rules for doing any act; so that by means of the two orders Baron Huddleston could act, notwithstanding no application was made at the trial. But "a court or a judge" means the court sitting in banc or a judge at chambers representing the court in banc. It has never been held that such a phrase comprised a judge, who was neither the court nor acting at chambers, merely because he was the judge at the trial. [76] *But then it was urged that Order LVII, Rule 6, gave him power as a judge at chambers to enlarge the time for the application to him as judge who tried the cause. I cannot think that this rule can have any such operation so as to enable a judge to act notwithstanding no application was made at the trial. Therefore I am clearly of opinion that the case is not brought within the terms of Order LV, and that the judge had no power to make the order as the judge who tried the action.

Secondly, it was argued that the judge had jurisdiction as a judge at chambers. If the terms of Order LV were, "or the court *or a judge* shall otherwise order," that would be so. But I must say that, notwithstanding what has often been said about these rules, they were drawn with the greatest care, and I have no doubt that the alternative "or

a judge" was advisedly omitted in Order LV. It was intended that the general rule as to costs should not be varied except by the judge on the instant when the facts were all before him and fresh in his memory, and that so important a matter as the right to the costs of a trial should not be varied after the trial except by an application to a Divisional Court; and the jurisdiction of a judge was advisedly excluded. I am, therefore, of opinion that "court" does not include a judge at chambers.

It was further argued that s. 39 of the Judicature Act of 1873 applied; but that section does not enable a judge of the High Court to do anything that a judge could not have done before the passing of the act; and before the passing of the act a judge at chambers could not have made this order as to costs.

As to Rule 22 of Order XLII, no new fact has arisen; there has been a miscarriage, no doubt, owing to a mistake, but that rule only applies to facts which have arisen too late to be pleaded.

On the whole, therefore, I am clearly of opinion that the order of Baron Huddleston was without jurisdiction, and that the order of the Queen's Bench Division was right. This is all we can decide, as we have no original jurisdiction to make an order as to costs.

AMPHLETT, J.A.: I am of the same opinion, on the same grounds. I will only add a few words. It was suggested that *injustice might happen, supposing the judge [177] had left the court, or perhaps the circuit town, before a verdict was returned, so that no application could be made as to costs; but I should think that the application might be formally made to the officer who is delegated by the judge to take the verdict; there was, however, no application made in the present case.

Appeal dismissed (').

Solicitors for plaintiff: *Abbott, Jenkins & Abbott*.

Solicitors for defendant: *Hewitt & Alexander*.

(') See *Parsons v. Tinling* (2 C. P. D., 119).

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Scutt v. Freeman.

[2 Queen's Bench Division, 177.]

Jan. 15, 1877.

SCUTT V. FREEMAN.

Practice—Action ordered to be tried in County Court—Certificate of Result of hearing Cause—Motion for Judgment—Order XXXVI, Rule 22; Order XL, Rule 1—County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 26.

Orders XXXVI and XL do not repeal the enactment in 19 & 20 Vict. c. 108, s. 26, by which, where a cause is ordered to be tried in a county court, the registrar is to certify the result of the trial to the superior court, and judgment is to be signed according to such certificate; and no motion for judgment is necessary.

AN order having been made for the trial of this action in a county court, under the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 26⁽¹⁾, there was a verdict for the plaintiff, who signed judgment on the certificate of the county court [178] registrar. A *summons was taken out at chambers calling on him to show cause why the judgment should not be set aside, on the ground that there ought to have been a motion in the superior court for judgment under the Judicature Act, 1875, Order XL, Rule 1. This summons having been dismissed,

Gye, for the defendant, moved, by way of appeal, to set aside the judgment: Under Order XXXVI, Rule 22, "no judgment shall be entered after a trial without the order of a court or judge." By Order XL, Rule 1, "Except where by the act or by these rules it is provided the judgment may be obtained in any other manner, the judgment of the court shall be obtained by motion for judgment." These regulations supersede the provision in 19 & 20 Vict. c. 108, s. 26, by which judgment may be signed on the certificate of the county court registrar.

Horne Payne, for the plaintiff: There is nothing in the orders referred to which can be taken to repeal the enactment as to signing judgment on the certificate. In *Lloyd*

⁽¹⁾ By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 26, "Where in any action of contract brought in any superior court the claim indorsed on the writ does not exceed £50, or where such claim, though it originally exceeded £50, is reduced by payment into court, payment, an admitted set-off or otherwise, to a sum not exceeding £50, a judge of a superior court, on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall

name, and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue, and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the master's office of such superior court, and judgment in accordance with such certificate may be signed in such superior court."

v. *Lewis* (¹), where it was held that a motion for judgment was unnecessary upon an award where the reference was before the Judicature Act, 1875, came into operation, Brett, J.A., expressed his opinion that Order XL must not be construed so as to interfere with the ordinary practice of the law and to cause useless expense. It may be mentioned that Lindley, J., at chambers, has already decided that in cases like the present judgment may be signed without application to a judge.

PER CURIAM (Mellor and Lush, JJ.): There is nothing in the Orders XXXVI. and XL, by implication or otherwise, to repeal the enactment as to signing judgment upon the certificate of the county court registrar.

Motion refused.

Solicitors for plaintiff: *Williamson, Hill & Co.*

Solicitors for defendant: *Le Riche & Son.*

(¹) 2 Ex. D., 7.

[2 Queen's Bench Division, 179.]

Feb. 16, 1877.

*THE DISS URBAN SANITARY AUTHORITY, Appel- [179
lants; ALDRICH, Respondent.

Justices, Power of, to state Case—20 & 21 Vict. c. 43—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 305—Authority to enter Premises.

Justices have no power to state a case on refusing to make an order authorizing the local authority to enter premises under the Public Health Act, 1875, s. 305, inasmuch as this is not the determination of a complaint within 20 & 21 Vict. c. 43, s. 2.

CASE stated by justices under 20 & 21 Vict. c. 43.

The facts, so far as material, were as follows. The appellants being about to construct a new sewer under the powers given by the Public Health Act, 1875 (38 & 39 Vict. c. 55), gave notice to the respondent, under s. 16 of that act, that they intended to carry the sewer under the land of the respondent, their surveyor having reported that it was necessary to do so. The respondent refused to allow them to enter his land for the purpose of making the sewer, and the appellants thereupon applied to the justices under section 305 of the act, for an order authorizing them to enter.

On the evidence laid before the magistrates at the hearing, it was contended on behalf of the respondent that the sewer intended to be made would be in contravention of the 17th section of the act, because the effluent water would deteriorate the purity of the river into which the outfall was to be.

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Diss Urban Sanitary Authority v. Aldrich.

It was contended for the appellants, that this was not a matter which the magistrates had any power to take into their consideration in deciding whether to grant or refuse an application under the 305th section. The magistrates refused the application on the ground suggested by the respondent, and stated the case to obtain the opinion of the court whether they were right in point of law in so doing.

Wills, Q.C. (*Hannen* with him), for the respondent, took the preliminary objection that the case was not one within 20 & 21 Vict. c. 43, s. 2. By the 2d section the power is given to state a case where, "after the hearing and determination by a *justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way by any law now in force or hereafter to be made," either party is dissatisfied with the determination as being erroneous in point of law. Here, there is nothing in the nature of a complaint. There is power to apply to the justices, in certain cases, for a license which may authorize the doing of acts which would otherwise be trespasses, and the justices have an absolute discretion to give or refuse such a license, according as under the circumstances they may think it should be granted or not. The 305th section says, that "if no sufficient cause is shown against the application, the court may make an order accordingly." It is clear that the word "may" here imports a purely discretionary power, because in the next section it is provided that in another case the justice "shall" by order require the occupier to permit the execution of works. There is no ground of complaint against the party before the order is obtained. He only acts in his own right to refuse the local board admission.

Lumley, for the appellants: It is contended that the justices' functions under the 305th section are not purely discretionary; the justices exercise a judicial function under the section, though the matter on which they here exercised it was beyond the limits of their jurisdiction. They are the judges to determine whether the entry is really necessary for the purposes of the works intended to be carried out, and it may be that the words "if no sufficient cause is shown" give them judicial powers with regard to various considerations, though not with regard to the general advisability of the proposed works; for that is matter for the discretion of the local board, against whom there is a remedy if a nuisance is subsequently created. It is further contended, that when the magistrates exercise a judicial function in making an order, the provisions of 20 & 21 Vict. c. 43,

apply. The respondent's construction of the word "complaint" is unnecessarily narrow. The matter of complaint is the refusal to admit for the purpose of doing the works which, by the general scope of the act, the local authority is empowered to carry out.

[LUSH, J.: The respondent has done no wrong. He simply says that his house is his castle.]

*By the 16th section of the act the urban sanitary [181 authority has a right to enter to make sewers, and this right the respondent refuses to allow them to exercise.

[LUSH, J.: If they have a right to enter, why is an application under the 305th section necessary? The 305th section would seem only to apply when there is no power given to enter without an order.]

It is contended that there is nothing unreasonable in its applying even when the act gives the power of entry without an order. It is very desirable that when the landowner refuses admission the local authority should be able to get judicial authority to enter.

[MELLOR, J.: There does not seem to be any complaint here upon which there can be a determination "erroneous in point of law." The justices are given, in certain cases, a discretionary power to grant a license to enter.]

The act gives a right to enter under s. 16, and the party refuses to allow it to be exercised. The application to the justices is to make an order that it shall be exercised. This may fairly be termed an order made upon a complaint.

[LUSH, J.: The suggested definition, of what constitutes a determination on a complaint under 20 & 21 Vict. c. 43, s. 2, seems far too wide.

MELLOR, J.: It would seem that such a mode of construction would include almost every matter on which magistrates exercise jurisdiction.]

The reasonable limitation is to cases where they exercise a judicial function. The cases in which it has been held that there is no power to state a special case are cases where their functions are ministerial, as where there is an application for a distress warrant to enforce a poor-rate:

THE COURT (Mellor, J., and Lush, J.) declined to hear the case on the ground that they had no jurisdiction.

Appeal dismissed.

Solicitors for appellants: *Sole, Turners & Knight.*

Solicitor for respondent: *Oldman.*

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Tully v. Howling.

[2 Queen's Bench Division, 182.]

Jan. 22, 1877.

[IN THE COURT OF APPEAL.]

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*TULLY V. HOWLING.

Charterparty—Rejection—Time—Detention.

The plaintiff agreed to charter a ship for twelve months after the completion of her then present voyage. After the completion of the voyage and when the plaintiff was ready to load the ship she was detained as unseaworthy; and the repairs were not finished until more than two months after the completion of the voyage:

Held, affirming the decision of the Queen's Bench Division, that the plaintiff was entitled to throw up the charterparty.

A CHARTERPARTY or agreement was, on the 4th of March, 1875, made between C. Tully, the plaintiff, and L. W. Howling, the defendant, the material part of which was as follows:—

It is this day mutually agreed between L. W. Howling, Esq., owner of the ship or vessel called the *Conquest*, of London, of the burthen of 187 tons register admeasurement, or thereabouts, whereof William Sanson is master, now in Sunderland, bound to London, and Messrs. Chas. Tully & Co., merchants and freighters of the said ship, for twelve months, for as many consecutive voyages as the said ship can enter upon after completion of the present voyage at and from Sunderland to London; that the said ship being tight, staunch, and strong, and every way fitted for the voyage, the said master, with the said ship, shall, with the first opportunity, load a full and complete cargo of coals in river or dock, at an approved berth, drops, or staiths, and being so laden shall therewith proceed to London, or so near thereto as she can safely get, and deliver the same to the order of the said freighters or their assigns, he or they paying freight for the same at the rate of 7s. per ton.

AFTER the voyage was completed, and when the plaintiff was ready to load the ship she was, by order of the Board of Trade, detained as unseaworthy. The plaintiff refused to take the ship. The necessary repairs were not finished until more than two months after the voyage was completed. The plaintiff had brought an action against the defendant for a debt of £30. The defendant, admitting the debt of £30 set up a counter claim for damages for not taking the ship, freights having in the meantime fallen.

The facts and dates are stated in detail in the judgment in the Court of Appeal.

At the trial a verdict was given for the defendant, damages £122, *from which the £30 was to be deducted, leave being reserved to the plaintiff to move for judgment for £30.

The plaintiff moved accordingly in the Queen's Bench Division.

June 2, 1875. *Waddy*, Q.C., and *Crompton*, for the plaintiff.

R. E. Webster, for the defendant.

The arguments were the same as on the appeal, and, in addition, the following cases were cited: *McAndrew v. Chapple* ⁽¹⁾; *Tarabochia v. Hickie* ⁽²⁾; *Simpson v. Crippin* ⁽³⁾.

COCKBURN, C.J.: This case seems to my mind perfectly clear. The cases cited by Mr. Webster have no application; they were not cases in which the contract was one that had reference to a given time or to the use of the ship for a given time, and that is the essence of the present contract. The plaintiff says: "I want a vessel for twelve months from a given date," or, if you please, "from the termination of a given voyage." I think it is a matter of doubt which of those two is the right construction of the contract; but taking it either way, what it comes to is this. The bargain is that the plaintiff is to have the use of the ship for twelve months, but the defendant is not in a position to give him the ship for twelve months from the date from which it was agreed the term should begin, whether it was a given date or the termination of a given voyage. He is not in a position to give him the use of the vessel, because she is in such a state that neither the owner nor the charterer would be justified in sending her to sea, and the defendant admits that to be the case, for he takes upon himself to repair the vessel. By the fact of his taking the vessel back on his own hands to repair, he makes it impossible for him to perform his part of the contract, which is, that the charterer shall have the use of the vessel for twelve months from a given period. Therefore, the result is, that if the charterer is to take the vessel at all he must take her not for twelve months, but for twelve months less two months. Therefore, it cannot be said that there was not a substantial deviation from the contract. I am of opinion that, under the circumstances, *the plaintiff was perfectly justified in saying, "What I bargained for was the use of the ship for a consecutive series of voyages; you cannot give me that, and I am not bound to go into the market to get some other ship and make some other bargain which may be advantageous or disadvantageous to me." I think these facts distinguish the case from those cited by Mr. Webster, in none of which was time of the essence of the contract.

MELLOR, J.: I am of the same opinion. I think there is nothing in the contract to show that the time might be

⁽¹⁾ Law Rep., 1 C. P., 643.

⁽²⁾ 1 H. & N., 183; 26 L. J. (Ex.), 26.

⁽³⁾ Law Rep., 8 Q. B., 14.

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divided into months: The contract which was contemplated was a contract for twelve months. During a substantial part of the twelve months, quite sufficient to frustrate the object of the contract, there was an inability to comply with the bargain which had been come to between the plaintiff and the defendant. Under these circumstances I cannot entertain any doubt that it was such a failure as entitled the plaintiff to say "I will end the contract and find some other means of carrying out my object."

LUSH, J.: I am of the same opinion. The bargain was a bargain for the use of a ship for twelve months, and the owner was not, at the time when the contract began to run, enabled to give the charterer that use, and was unable to give it for two months afterwards. In my opinion, under those circumstances, the charterer may, if he pleases, repudiate the contract, because he contracts for twelve months' service, and he is not bound to take ten months' service. The cases cited by Mr. Webster stand on an entirely different footing. All those were cases of voyage-charters. Where a ship is chartered for a voyage without any definite period for the commencement of the voyage, and a delay takes place, the question is, whether that delay is so great as to frustrate the object for which the charterer entered into the charterparty. Here it is not so. The plaintiff cannot have the services of the ship he contracted for during twelve months, and the question is to be determined upon the construction of the contract itself. Here he bargained to have the services of the ship for twelve months from the time when she should return from the voyage from Sunderland to London, which she was about to commence, and she [185] *had returned from the voyage on the 23d of March. Then the time began to run for which he stipulated to have the services of the ship. It is then discovered that the ship is in such a state that the owner is not able to take her to sea. Then the order came from the Board of Trade, and it takes two months to repair her. After that time the shipowner says, "You are bound to take her for the rest of the time." But I apprehend that on no principle could he say that. This is entirely different from a case of a voyage-charter, where the only question is, whether the delay is so great as to make it useless to prosecute the voyage to its intended end. I cannot say that I have the slightest doubt upon the point, therefore the judgment for the defendant must be set aside, and the judgment entered for the plaintiff.

Judgment for the plaintiff.

The defendant appealed.

Nov. 15 & 16, 1876. *Philbrick*, Q.C., and *R. E. Webster*, for the defendant: No doubt if there had been nothing to prevent it the year would have begun on the 9th of April, but there is no condition precedent that the ship shall be ready at the appointed time, and the only question is, whether the objects of the charterer were frustrated by the delay; if not, he cannot throw up the charter, and can only recover damages. Here he was not able to get a cargo for the ship at the time, and was obliged after some delay to procure a cargo of his own. He might have taken up another ship if he had really wanted one. It is not suggested that the ship would not be ready in a short time. The charter was not to begin to run until she came back from London. Suppose that she had been detained there. Or, suppose she had, after the first voyage, been detained. There is in a time-charter no warranty: *Havelock v. Geddes* ⁽¹⁾. The truth is, no doubt, that the market fell, and the plaintiff was glad to throw up the charter. The rule is laid down in *Dimech v. Corlett* ⁽²⁾ and *Behn v. Burness* ⁽³⁾. If they had agreed that she was to be ready on a given day it might make a difference, as then time might be of the essence of the contract. *Jackson v. Union Marine Insurance Co.* ⁽⁴⁾ shows *the rule, and though it relates [186 to a voyage-charter, that makes no difference. The plaintiff might have had a full year from the time when the ship was ready. He was to have the ship for a year, and that was the meaning of the contract.

Crompton (*Waddy*, Q.C., with him), for the plaintiff: The defendant was bound within a reasonable time after the arrival of the vessel to tender her fit for the cargo. A few days' delay might not have signified, but this was indefinite. How long was the plaintiff to wait? Six months or nine months, and then have her for the rest of the year only? This is not a question of seaworthiness, for the vessel could not start at all. Was the plaintiff to look for another ship, and then at the expiration of the first voyage, if she was not ready, look for another, and so on? If once the charter had been acted on, the case would be different, and it would be a question of damages, but here the contract has altogether failed: *Bradford v. Williams* ⁽⁵⁾.

Webster, in reply, cited *Rankin v. Potter* ⁽⁶⁾.

Cur. adv. vult.

⁽¹⁾ 10 East, 555.

⁽²⁾ 12 Moo. P. C., 199.

⁽³⁾ 3 B. & S., 751; 32 L. J. (Q.B.), 204.

⁽⁴⁾ Law Rep., 8 C. P., 572.

⁽⁵⁾ Law Rep., 7 Ex., 259.

⁽⁶⁾ Law Rep., 6 H. L., 83.

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Tully v. Howling.

Jan. 22. The judgment of Kelly, C.B., Mellish, L.J., and Amphlett, J.A., was delivered by

MELLISH, L.J.: This was an appeal from a judgment of the Queen's Bench Division ordering a verdict, which at the trial had been entered for the defendant on a counter claim, for £92, to be entered for the plaintiff for £30, pursuant to leave reserved. The defendant admitted that he owed the plaintiff the £30, and the only question in the cause was, whether the defendant, under the circumstances proved at the trial, was entitled to succeed on a counter claim by which he sought to recover damages from the plaintiff on account of the plaintiff having refused to perform a charterparty he had entered into with the defendant. By this charterparty it was agreed that the defendant's vessel, the Conquest, then in the port of Sunderland, and bound for London, should be chartered to the plaintiff for twelve months for as many consecutive voyages between Sunderland and London as the [187] said ship could enter upon after the *completion of the then present voyage. The Conquest duly completed her then present voyage, and in March, 1875, returned to Sunderland. On the 8th of April the defendant gave notice to the plaintiff that on the 9th of April the Conquest would be ready to receive her cargo, and it was admitted in the argument before us that the year for which the Conquest was chartered began to run on the 9th of April. The plaintiff endeavored to procure a cargo for the Conquest, but for some time he was unable to procure one. He then determined to load the Conquest on his own account, and on the 20th of April gave notice to the master that he was ready to load. Before, however, any cargo was actually loaded, the officer of the Board of Trade objected to the vessel taking any cargo on board on account of her being unseaworthy, and on the 7th of May, a formal order was issued detaining the Conquest until she was repaired. Thereupon, the plaintiff, on the 9th of May, not being able to get the vessel, gave notice to the defendant that he rescinded the charter. The defendant proceeded without delay to repair the Conquest, and by the 17th of June she was repaired and ready to receive cargo, but the plaintiff refused to load her.

Under these circumstances it has been held by the Queen's Bench Division that the plaintiff was justified in rescinding the charter, and in refusing to load the Conquest, and we are of opinion that their judgment ought to be affirmed. It was admitted on the argument before us that the year for which the Conquest was chartered commenced on the 9th of April, and that the Conquest was not really ready to

receive cargo, so that the plaintiff could have had the use of her, until the 17th of June; and therefore the questions simply are, whether a person who has agreed to charter a vessel for twelve months, commencing from the 9th of April, is bound to wait until the 17th of June before he obtains possession of the vessel, and whether he is then bound to take her for a period of less than ten months? In other words, in a charter for a stipulated time, is the time of the essence of the contract, or is the charterer bound to take the vessel for a time substantially different from the time specified in the charter? We are of opinion that as in a charter for a voyage the specified voyage would be of the essence of the contract, and the charterer, if he could *not have [188 the use of the vessel for the specified voyage, would not be bound to take her for any other voyage, so in a charter for time, if the charterer cannot have the vessel for the specified time, he is not bound to take the vessel for a shorter time or a substantially different time, and if he cannot get the vessel for the specified time he may throw up the charter. In all contracts which are to be mutually performed the party who claims performance must be ready to perform his part of the contract, and cannot compel the opposite party to take something substantially different from that which was contracted to be given. If there is an agreement to sell 100 quarters of wheat, the purchaser is not bound to accept 90 quarters, though the price of wheat has fallen, and it is for his advantage to have the smaller quantity. He can say, "I never agreed to buy a quantity of 90 quarters, and therefore I will not take them." So in the present case the plaintiff can say, "I never agreed to charter the *Conquest* from the 17th of June, 1875, to the 9th of April, 1876, and therefore I will not take her for that period." Several cases were referred to, but the only case which related to time-charters was *Havelock v. Geddes* ⁽¹⁾. In that case, however, it was admitted on the pleadings, as is repeatedly pointed out by Lord Ellenborough in his judgment, that the charterer had had the use of the ship, and that the action was brought to recover freight actually earned, and under those circumstances the court no doubt held that it was no defence that the ship had not been repaired in due time before the commencement of the charter; but it was not held that a charterer who has chartered a vessel for twelve months is bound to accept the use of the vessel for a substantially different period, nor is any opinion expressed to that effect.

(1) 10 East, 555.

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Metropolitan Railway Co. v. Defries.

The other cases which were cited seem to us to have no bearing on the subject.

BRETT, J.: I agree; not on the ground that there is in such a charter a warranty that the ship should be seaworthy on the day when the charter is to commence, with a right to reject the ship if the warranty is not complied with, nor on the principle that time was of the essence of the contract, but on the ground that, under the circumstances proved at 189] the trial, the jury might, and indeed *should, in reason, have found that the ship was not fit for the purpose for which she was chartered, and could not be made fit within any time which would not have frustrated the object of the adventure.

Judgment affirmed.

Solicitors for plaintiff: *J. W. Hickin*, for R. Brown & Son, Sunderland.

Solicitors for defendant: *Lowless & Co.*

[2 Queen's Bench Division, 189.]

Jan. 30, 1877.

THE METROPOLITAN RAILWAY COMPANY V. DEFRIES
and Others.

Use and Occupation—Vendor and Vendee—Vendor remaining in Possession after Time fixed for Completion—Vendee entitled to "all Rents and Profits."

Claim for use and occupation, stating that the plaintiffs and defendants entered into an agreement for the purchase by the plaintiffs of warehouses and premises belonging to the defendants. That by the agreement the purchase was to be completed and possession given to the plaintiffs on the 29th of September, 1869, up to which time all outgoings were to be paid by the defendants, and from which time the plaintiffs were to receive all rents and profits, the plaintiffs to pay interest on the purchase-money from the 29th of September until the completion of the purchase. That in fact the purchase was not completed till the 13th of March, 1876, though the plaintiffs were ready and anxious to have completed it at an earlier date. That the plaintiffs paid the purchase-money by instalments on various dates prior to the 13th of March, 1876, and interest on the same according to the agreement. That the defendants refused to give up possession on the completion of the purchase, &c., but the plaintiffs obtained possession by warrant from the sheriff on the 3d of April, 1876:

Held, that under the words "all rents and profits" in the agreement, the plaintiffs were entitled to a fair occupation rent, and that it was immaterial whether or not the occupation would by itself have been sufficient to support the action.

STATEMENT of claim. 1. The plaintiffs are a railway company who were authorized by the Metropolitan Railway (Tower Hill Extension) Act, 1864, to take for the purposes of their act certain warehouses and premises in Gravel Lane, Aldgate, City, which belonged to the defendants.

190] *2. On the 5th of March, 1868, the plaintiffs and

the defendants entered into an agreement for the purchase by the plaintiffs from the defendants of the warehouses and premises in Gravel Lane for the sum of £8,800.

3. By the agreement it was (*inter alia*) agreed that the purchase should be completed and possession given to the plaintiffs' company on the 29th of September, 1869, up to which time all outgoings were to be paid by the vendors, and from which time the company were to receive all rents and profits, and that the company should pay interest on the sum of £8,800 at certain rates therein agreed upon from the 29th of September, 1867, until the completion of the purchase.

4. The purchase of the premises was not completed till the 13th of March, 1876, although the plaintiffs were ready and anxious to have completed the purchase at an earlier date.

5. The plaintiffs paid the purchase-money by instalments on various dates prior to the 13th of March, 1876, and interest also on the same according to the agreement of the 5th of March, 1868.

6. The defendants refused to give up possession of the premises on the completion of the purchase, and alleged that they were entitled to six months' notice from the plaintiffs prior to their being obliged to give up possession of the warehouse and premises.

7. The plaintiffs contended that no such notice was requisite to entitle them to the possession of the warehouse and premises, and therefore issued their warrant to the sheriff of Middlesex to put them into possession of the same.

8. Possession was accordingly given to the plaintiffs on the 3d of April, 1876.

9. The defendants have continued in the use and occupation of the warehouse and premises from the 5th of March, 1868, until the 3d of April, 1876, but have paid no rent for the same.

10. The plaintiffs claim rent of the defendants for their use and occupation of the premises at the rate of £150 per annum as the fair value of the same from the 29th of September, 1869, until the 3d of April, 1876.

Demurrer and joinder in demurrer.

**Edward Pollock* (*Gates*, Q.C., with him), in sup- [191] port of the demurrer: The statement of claim does not show any occupation of the premises by the defendants as tenants to the plaintiffs. The occupation by the defendants between the 13th of March and the 3d of April, 1876, may possibly have been wrongful, but it must be taken that, up to the 13th

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of March, the delay was not their fault, and they did not occupy as tenants. The mere fact that the vendor remains in possession after the time for completion is not enough to make him liable in an action for use and occupation: *Tew v. Jones* ⁽¹⁾. The courts of equity have held that, where a delay in taking possession is the fault of the purchaser, he is not entitled to any occupation-rent in respect of the premises: *Dakin v. Cope* ⁽²⁾. Lastly, the plaintiffs waived their right (if any) by paying the full amount of the purchase-money without seeking any deduction in respect of rent.

Grantham, for the plaintiffs: The plaintiffs seek to recover under the express terms of the agreement, by which they are entitled to "all rents and profits" from the day fixed for the completion of the purchase. In *Sherwin v. Shakespeare* ⁽³⁾, where conditions of sale provided that the balance of the purchase-money should be paid on the 25th of April, "when the purchase shall be completed and the purchaser shall have the rents, profits, &c.;" a decree for specific performance was granted at the suit of the vendors, but an account was ordered as against them of rents and profits. It does not appear that the plaintiffs were in default. The defendants seem to have insisted that they were tenants of the premises and entitled to six months' notice.

Edward Pollock, in reply: The defendants were never in possession except as unpaid vendors.

MELLOR, J.: I am of opinion that this demurrer must be overruled, on the ground that the statement of claim shows that the plaintiffs have a cause of action, for the amount of the rents and profits of the premises during the interval which elapsed before the purchase was completed. I think that the words of the agreement of purchase are consistent with that view and with no other. It appears that the [192] *plaintiffs agreed to purchase these premises from the defendants, and the time at which the purchase was to be completed and possession given to them was fixed, namely, the 29th of September, 1869, up to which time all outgoings were to be paid by the vendors, and from which time the plaintiffs were to receive "all rents and profits," and it was agreed that the plaintiffs should pay interest on the purchase-money from the 29th of September until the completion of the purchase. The agreement, therefore, on the one hand, secured to the vendors interest on any part of the purchase-money that remained unpaid, and on the other hand

⁽¹⁾ 13 M. & W., 12.

⁽²⁾ 2 Russ., 170; on appeal, p. 181.

⁽³⁾ 5 De G. M. & G., 517; 23 L. J.

(Ch.), 177.

secured to the vendees that they, paying this interest, should be entitled to the rents and profits of the premises. Now, at the date of this agreement, it was known to both parties that the defendants were in possession of the premises, so that there were no profits from the premises except those enjoyed by the defendants. I agree that, in the absence of the words "rents and profits," it might have been open to the defendants to argue that there were no facts from which any liability to pay the amount claimed in this action could be inferred. But the case in the Court of Chancery to which we have been referred, *Sherwin v. Shakespeare*(¹), is a strong authority in point. In that case a delay had taken place which does not appear to have been the fault of either party. The court ordered that interest should be paid by the vendee in respect of his delay in paying the purchase-money, and that the vendor should pay an occupation-rent for the time during which he remained in possession of the premises. There was some discussion as to whether the vendor should be allowed income-tax, but the substantial value of the decision is that a court of equity decided that he must pay rent during the portion of time that he was in occupation. The case was very much the same as the present, and I am satisfied that judgment ought to be for the plaintiffs, and that the defendants are liable to pay an occupation-rent. It is true that the amount of such rent has never been fixed, but it may be fixed at the trial. It has been urged, that it cannot be said that the defendants were placed or allowed to remain in possession of the premises by the plaintiffs. But the express terms of the agreement get rid of any difficulty on this score. It seems just *and [193 fair that on the one side there should be the liability to pay interest, and on the other a liability for the rents and profits.

FIELD, J.: I am of the same opinion. This action is brought to recover the value of premises during the time they were in the occupation of the vendors. The defendants, as matters stand, do not deny that they were in occupation of the premises after the time for giving up possession, and they do not deny that interest was paid on the purchase-money up to the time when possession was given, but they contend that the statement of claim does not show any cause of action for use and occupation. Now, it is a great mistake to suppose that all the requirements of the old action for use and occupation must be put into the statement of claim. Under the old system this might have been the case, but un-

(¹) 5 De G. M. & G., 517; 23 L. J. (Ch.), 177.

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der the present forms of pleading all we have to see is whether the statement shows facts upon which a court of equity would decree that money must be paid. Let us see what is stated as to the agreement. By the agreement it was agreed that the purchase should be completed and possession given to the plaintiffs on the 29th of September, 1869, up to which time all outgoings were to be paid by the vendors, and from which time the plaintiffs were to receive all rents and profits. Now what is the meaning of these words? They must mean that from that day the equitable ownership of the property is to vest in the plaintiffs, and that the defendants are to be considered as equitable owners of the purchase-money. The defendants, as equitable owners of the money, were to receive interest, and the plaintiffs were to have the rent. The parties to the agreement in effect say, "What we are agreeing upon may not happen, but it shall be as if it had happened." I think it clear that the words "all rents and profits" must mean that which is equivalent to them, an occupation-rent. There might have been some difficulty if the plaintiffs had been obliged to show that they were entitled to bring an action for rent according to the old forms of pleading, but this is not the case.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Burchells.*

Solicitors for defendants: *Scard & Son.*

[2 Queen's Bench Division, 194.

Feb. 15, 1877.

194] *RUMBALL V. THE METROPOLITAN BANK.

Negotiable Instrument—Scrip—Shares in Banking Company—Estoppel.

Scrip certificates, by which it was certified that, after the payment of certain instalments, the bearer thereof would be entitled to be registered as the holder of shares in a banking company, were issued to the plaintiff, and by him deposited with a stockbroker for the purpose of paying the instalments remaining due, and dealing with such certificates as the plaintiff should direct. The broker in fraud of the plaintiff, and without his authority, deposited the scrip with the defendants as security for an amount due from him, the broker, to the defendants. The defendants were not aware of the fraud. It was proved that the usage among bankers, discounters, money dealers, and on the Stock Exchange, had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery:

Held, on the authority of *Goodwin v. Roberts* (1 App. Cas., 476; Law Rep., 10 Ex., 337), that the defendants were entitled to the scrip certificates as against the plaintiff, first, on the ground that by reason of the usage the certificates had become negotiable instruments transferable by mere delivery, and, secondly, on the ground that the plaintiff, by depositing with his broker instruments purporting to be transferable by delivery to a *bona fide* holder for value, was estopped from denying that they were so transferable.

SPECIAL case, the facts of which sufficiently appear from the judgment.

Feb. 6. *Anstie*, for the plaintiff: The present case is distinguishable from *Goodwin v. Robarts* ⁽¹⁾. There it was held that no distinction could be drawn between the scrip certificates and the bonds, the title to which they represented. The bonds being mere securities for money, and transferable by delivery, it was held that the scrip was so also. Scrip certificates representing the right to shares in the future stand on a wholly different footing. It is contended that a negotiable instrument must represent money, and that in none of the various cases decided with regard to the various classes of negotiable instruments has it been held that a negotiable character can be conferred on anything that is not a security for money. If a document contained an agreement to convey a piece of land to bearer, no usage could make this negotiable. All that the scrip represents is a right to become in future a partner in a joint stock company. The effect of a decision *in the defendant's favor [195 would be to repeal by implication the provisions of 30 & 31 Vict. c. 29. [He also cited 30 & 31 Vict. c. 131, s. 27-36; *Gurney v. Behrend* ⁽²⁾; *Barber v. Meyerstein* ⁽³⁾; *Daly v. Thompson* ⁽⁴⁾; *Beckitt v. Bilbrough* ⁽⁵⁾; *Midland Great Western Ry. Co. v. Gordon* ⁽⁶⁾; *Eustace v. Dublin Trunk Connecting Ry. Co.* ⁽⁷⁾; *Crouch v. Credit Foncier* ⁽⁸⁾.]

Ridley, for the defendants: First, this scrip was, by virtue of the usage, negotiable by delivery; secondly, the defendants are entitled to retain the scrip on the principle of *Pickard v. Sears* ⁽⁹⁾, viz., that where of two innocent persons one must suffer, he must suffer who enabled the fraud to be committed. The case is undistinguishable on both these grounds from *Goodwin v. Robarts* ⁽¹⁰⁾. The scrip and the shares are quite distinct. The scrip does not represent that which would not be itself negotiable, viz., the share, the share does not exist while the scrip is in being. It is the inchoate form of the share, and if by established mercantile usage it is treated as negotiable by delivery, the court will give effect to such usage. There is no substantial reason why negotiability should be confined to securities for money in the sense contended for on behalf of the plaintiff. Mortgage bonds of an American railway may repre-

⁽¹⁾ Law Rep., 10 Ex., 337; 1 App. Cas., 476.

⁽²⁾ 3 E. & B., 622; 23 L. J. (Q.B.), 265.

⁽³⁾ Law Rep., 4 H. L., 317.

⁽⁴⁾ 10 M. & W., 309.

⁽⁵⁾ 8 Hare, 188; 19 L. J. (Ch.), 522.

⁽⁶⁾ 16 M. & W., 804; 16 L. J. (Ex.), 166.

⁽⁷⁾ Law Rep., 6 Eq., 182.

⁽⁸⁾ Law Rep., 8 Q. B., 374.

⁽⁹⁾ 6 A. & E., 469.

⁽¹⁰⁾ 1 App. Cas., 476.

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sent a right to land, plant, &c., and yet they might be transferable by delivery.

Anstie, in reply, cited *Arnold v. City Bank* (').

Cur. adv. vult.

Feb. 15. The judgment of the Court (Cockburn, C.J., and Mellor, J.) was delivered by

MELLOR, J.: This was an action to recover four scrip certificates of the Anglo-Egyptian Banking Company, Limited, issued by that company to the plaintiff, and which had come into the hands of the defendants as holders for value, but through the fraud of the plaintiff's agent.

196]. *The certificates were in the following form: "This is to certify that the sum of £10 per share has been paid in respect of the above shares (being £5 per share on account of capital, and £5 per share on account of premium), and that after the payment of the undermentioned further instalments to the London Joint Stock Bank, Princess Street, London, the bearer hereof will be entitled to be registered as the holder of ten shares of £20 each in the Anglo-Egyptian Banking Company, Limited." Then followed the enumeration of the instalments, with the dates at which they were respectively to be paid, with the bankers' receipts in blank for the instalments as they should become due.

The first instalment on these certificates having been paid, they were left by the plaintiff in the hands of a Mr. Crossley, a stockbroker, for the purpose of his paying the remaining instalments as they became due, and dealing with the certificates as the plaintiff should direct. They were afterwards fraudulently deposited with the defendants by Crossley, without the knowledge or authority of the plaintiff, as security for an amount due from Crossley to the defendants on a loan account. The defendants, however, were not aware of the fraud or that there was anything wrong or irregular in the transaction. The question is, whether, under these circumstances, the plaintiff is entitled to recover these shares from the defendants or whether the defendants are entitled to retain them. This will depend on the following state of facts expressly set forth in the special case. It is there stated as follows: "Scrip certificates in a form similar to that of the said scrip certificates issued to the plaintiff have been issued by railway companies for thirty years past, by mining companies for twenty-five years past, and by banking, gas, water, and other companies for fifteen years past. Each of the above classes

(') 1 C. P. D., 578.

of scrip certificates during all the period since its respective issue has been well known to and largely dealt in by bankers, discounters, money dealers, and the members of the London Stock Exchange, and through them by the public. It is and has been the usage of such bankers, discounters, money dealers, and members of the said exchange, during all the above periods, to buy and sell the said scrip certificates respectively, and to advance loans of money upon the security of them, and upon such dealings to pass the said scrip *certificates by mere delivery as a negotiable instru- [197 ment transferable by delivery, and in fact the said respective scrip certificates have been supposed to be negotiable by mere delivery, and have been dealt with as such.

“As soon as a name has been inserted in the said scrip certificates, as that in which the shares for which the said scrip certificates can be exchanged are to be registered, the said scrip certificates, and others similar in form, cease to pass by mere delivery, and the usage above set out is no longer applicable to them.”

The first question which presents itself is, whether the present case falls within the principle of the decision in *Goodwin v. Roberts*, as decided in the Court of Exchequer Chamber⁽¹⁾, and in the House of Lords on appeal⁽²⁾; and we think it does, both with reference to the usage of the monetary world in respect of such certificates, which brings the case within the principle of the decision of the Court of Exchequer Chamber—which principle was affirmed by the Lord Chancellor in the House of Lords—and also on the other ground on which the decision of the House of Lords proceeded, namely, that if a party possessed of a security purporting on the face of it to be transferable by delivery chooses to leave such security in the hands of a third party, and the latter makes it over to a *bona fide* holder for value, the true owner must be taken to have brought about his own loss, and cannot recover it back. The Lord Chancellor there says: “The appellant might have kept this scrip in his own possession, and, if he had done so, no question like the present could have arisen. He preferred, however, to place it in the possession and under the control of his broker, or agent, and although it is stated that it remained in the agent’s hands for disposal or to be exchanged for the bonds when issued, as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant, or of any private instructions he might have given to his agent. The scrip itself would be a representation

⁽¹⁾ Law Rep., 10 Ex., 337.

⁽²⁾ 1 App. Cas., 476.

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to any one taking it—a representation which the appellant must be taken to have made or to have been a party to—[198] that if the scrip were taken in good faith *and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed, for the moment, that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claim could be made by the taker in his own name against the foreign government; still the appellant is in the position of a person who has made a representation on the face of his scrip, that it would pass with a good title to any one on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made. I am of opinion that, on doctrines well established, of which *Pickard v. Sears* (1) may be taken to be an example, the appellant could not be allowed to defeat the title which the respondents have thus acquired."

The present case appears to us to come within both these decisions: as regards the usage, within the principle of the decision of the Court of Exchequer Chamber; as regards the applicability of the doctrine of *Pickard v. Sears* (1) within the second ground of decision adopted by the House of Lords. The case being thus concluded by authority, it is unnecessary to deal with it on principle, and our judgment must be for the defendants.

Judgment for the defendants.

Solicitor for plaintiff: *Hodding.*

Solicitors for defendants: *Newman, Stretton & Hilliard.*

(1) 6 A. & E., 469.

See *Johnson v. Credit, etc.*, *post*, p. 486. A *bona fide* purchaser for value of a non-negotiable chose in action from one upon whom the owner has, by assignment, conferred the apparent absolute ownership, where the purchase is made upon the faith of such ownership, obtains a valid title as against the real owner, who is estopped from asserting a title thereto: *Moore v. Met., etc.*, 55 N. Y., 41, overruling in part *Bush v. Lathrop*, 22 N. Y., 535; *Grocers' Bank v. Neet*, 29 N. J. Eq., 449; *Thompson v. Toland*, 48 Cal., 99; *Burton v. Peterson*, 35 Leg. Int., 144.

See *Greene v. Warnick*, 64 N. Y., 220; *Trustees, etc., v. Wheeler*, 61

N. Y., 88; *Erb v. Great Western, etc.*, 42 U. C. Q. B., 90.

A recital in an assignment from the apparent owner is not evidence, however, against the real owner that it was for value; and this is so although the assignment is introduced by the latter: *Moore v. Met., etc.*, 55 N. Y., 41.

One who takes upon a precedent debt is not a *bona fide* purchaser for value: *Burton v. Peterson*, 35 Leg. Int., 144.

Defendant L. delivered the certificate of certain stock owned by him to defendant B., to secure a loan of \$3,000 from him. B. applied to plaintiff for a loan of \$8,000 thereon for a client,

which was refused unless B. could procure a proper power of attorney. B., by representing that the certificate should be transferred to him to secure his loan, procured from L. a blank irrevocable power of attorney. He then procured the loan from plaintiff, and a further loan of \$1,000, and absconded without paying any of the money to L. In an action to foreclose the pledge, held, that possession of the certificate and power of attorney would give B. the apparent authority to sell as agent, but gave no power to pledge; that as B. claimed only to act as agent, not as owner, plaintiff acquired no title, and that L. was not estopped from disputing the pledge: *Merchants' Bank v. Livingston*, 7 N. Y. Weekly Dig., 249, N. Y. Court Appeals.

"In pursuance of an order of the superintendent of insurance, plaintiff's officers issued a call for five per cent. in cash. It being difficult to procure cash payments from the stockholders, an arrangement was made between the officers of the company and P. & Co., private bankers, composed of P., plaintiff's president, and A., one of the di-

rectors of plaintiff, by which P. & Co. agreed to take notes given by the stockholders and give plaintiff a cash credit therefor, plaintiff not to draw on the credit faster than the notes were paid, and the makers not to be called upon for payment unless necessary. The arrangement was carried out, the notes being payable to and indorsed by the makers, and delivered to some of plaintiff's officers, who transferred them, without indorsement, to P. & Co. It was then reported to the insurance department that the cash required by the superintendent had been paid in, and deposited in bank. P. & Co. pledged these notes to defendant, and afterwards failed, owing plaintiff a large amount, including a portion of the credit so given. In an action to recover possession of these notes: Held, that the action could not be maintained; that the notes had no legal inception until indorsed by P. & Co.; that plaintiff never had any title to the notes, or if it had, it parted with such title to P. & Co.:" *Black River, etc., v. N. Y., etc.*, 7 N. Y. Weekly Dig., 251, N. Y. Court Appeals.

[2 Queen's Bench Division, 209.]

Feb. 13, 1877.

[IN THE COURT OF APPEAL.]

*GLEGG V. GILBEY (').

[209

Bankruptcy—Composition Deed—Liability of Surety—Construction.

B., having presented a petition for the liquidation of his affairs, the statutory majority of his creditors passed a resolution accepting a composition payable in three instalments, the last instalment to be guaranteed by the defendant. The defendant signed a guarantee accordingly, and a deed was made between B., the defendant, and certain persons called "the inspectors." The creditors of B. were also made parties to the deed, but some of them did not execute it. By the deed, after reciting that it had been agreed that, until payment of the composition, B. should carry on his business under the inspectors, it was provided that if B. should make default in the payment of it, or if it should appear to the inspectors, from the state of his business or otherwise, that the instalments would not be duly met, it should be lawful for them to apply to the Court of Bankruptcy to adjudge him a bankrupt, and without prejudice to this right it should be lawful for them in any such event to require him to assign all his property to them, as if they were trustees under liquidation proceedings, and further, that, "in the event of B. being adjudicated bankrupt, or of a conveyance or assignment of his property being made or required under the provisions of the deed before full payment of the composition, the defendant should be released from his guarantee." B., having made default in payment of the second instalment, was made bankrupt on the petition of a creditor who was not bound by the resolu-

(¹) Affirming 19 Eng. R., 190.

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tion, and had not executed the deed. After the bankruptcy he made default in payment of the third instalment:

Held, affirming the judgment of the Queen's Bench Division, that the defendant was liable; as he could only be released from his guarantee by a bankruptcy procured by the inspectors under the provisions of the deed.

APPEAL from the judgment of the Queen's Bench Division in favor of the plaintiff on a special case (').

The case is set out at length in the report in the court below.

Benjamin, Q.C., and *Willis*, for the defendant.

Russell, Q.C., and *Holt*, for the plaintiff, were not called on.

THE COURT (Mellish, L.J., and Baggallay, and Brett, J.J.A.) affirmed the judgment of the court below, and on the same grounds.

Judgment affirmed.

Solicitors for plaintiff: *Lewis, Munns & Longden*.

Solicitor for defendant: *Broughton*.

(¹) 19 Eng. R., 190.

[2 Queen's Bench Division, 210.]

Feb. 2, 1877.

210] *THE BUENOS AYRES AND ENSENADA PORT RAILWAY COMPANY V. THE NORTHERN RAILWAY COMPANY OF BUENOS AYRES.

Action for Rent of Premises situated Abroad—Jurisdiction of the English Courts—Domicile of Parties—Act of State.

Claim, stating that the plaintiffs and defendants were each of them limited companies, with registered offices in London; that the action was brought for rent of a railway station in Buenos Ayres (into possession of which the defendants were put by the plaintiffs), and for part of the cost of constructing lines of railway and approaches to the station.

Defence, that the plaintiff and defendant companies were domiciled in the Argentine Republic, and carried on business there; that the premises in question were constructed on land which was the property of the republic, and that the plaintiffs and defendants were joint concessionaires under the republic of certain easements appurtenant thereto. That the construction of the premises was directed by the government of the republic, and was for the benefit and convenience of the citizens of Buenos Ayres, and that by the laws of the republic powers of adjusting all rights arising out of the construction, and applicable to the claim of the plaintiffs were vested in the government, and that the contract (if any) as to the cost of the construction was made at Buenos Ayres, and was subject to the law of the place of contract, and that the republic had assumed jurisdiction over the plaintiff's claim:

Held, on demurrer, that the defence was bad, as both parties to the action were within the jurisdiction of the English courts, and the facts alleged did not show that the Argentine Republic had exclusive jurisdiction over the claim.

DEMURRER to the first six paragraphs of the statement of defence, which are fully set out in the judgment of the court.

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Jan. 30. *Thrupp*, for the plaintiff, argued that the statement of defence was bad, as it did not show that the courts of the Argentine Republic had exclusive jurisdiction over the cause of action. The claim was for use and occupation of a railway station, and in such actions the venue was always transitory, so that *Whitaker v. Forbes* (¹), where it was decided that an action could not be maintained by the devisee of a rent-charge upon land situate in Australia, has no application. But it is to be observed that even in that case Lord Chancellor Cairns said that the action might possibly now lie since the abolition of venues by the Judicature Act. *Mostyn v. Fabrigas* (²) decides that where the venue *is transitory, the English courts have jurisdiction [211 over actions arising abroad.

Benjamin, Q.C. (*Mansel Jones* with him), for the defendants, argued that the defence to the action was not founded upon the venue, but upon the fact that the Argentine Republic, by an act of state, had exercised control over the property in question. The republic had the same jurisdiction over the railway as the Board of Trade have over English railways. The court would, therefore, having regard to the comity of nations, decline to entertain this claim.

Thrupp, in reply: It may be admitted that the Argentine Republic have jurisdiction over this claim, but the defence fails to show that they have exclusive jurisdiction.

Cur. adv. vult.

Feb. 2. MELLOR, J.: In this case, which was argued before me by Mr. Thrupp in support of the demurrer, and by Mr. Benjamin in support of the validity of the first six paragraphs in the statement of defence pointed at by the demurrer, I am of opinion that the plaintiffs are entitled to judgment, and that the demurrer must prevail. By the statement of claim the plaintiffs, who are a limited company, having their registered office at 8 Union Court, Broad Street, in the city of London, sue the defendants, whose registered office is at No. 40 Finsbury Circus, in the city of London, for certain rents, maintenance, and a certain sum for the defendants' share in the construction of certain lines of railway, building premises, and approaches to the central station in the city of Buenos Ayres, which the defendants were, in January, 1873, let into the beneficial use and occupation of, on the terms that they should pay to the plaintiffs' company annually the rent and maintenance for and of the said station, lines of railway, buildings, and prem-

(¹) 1 C. P. D., 51.

(²) 1 Sm. L. C., 5th ed., 607.

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ises, and the rent for the said approach usual in similar cases, and that the defendants have occupied and used the same and the said approach since January, 1873. To this the defendants, in the first six paragraphs of their statement of defence, plead that the plaintiffs' and defendants' companies are respectively domiciled in the Argentine Republic, and carrying on their business there. That the central station mentioned in the plaintiffs' statement is constructed on land which is the property of the said Republic; and that the plaintiffs and defendants are joint concessionaires under the said Republic of certain easements appurtenant thereto, the rights of the plaintiffs not being in any way superior to those of the defendants, who further allege that the construction of the said central station was directed by the government of the said Republic, and was for the benefit and convenience of the citizens of the said city of Buenos Ayres, and by the express provision of the laws of the Republic, powers of adjusting all rights arising out of the said construction properly applicable to the claim of the plaintiffs are vested in the government, and that any express or implied contract which can be proved to exist between the plaintiffs and the defendants with respect to the distribution of the cost of the construction was made at Buenos Ayres, and is subject to the law of the place of contract. It then alleges that the Republic has assumed jurisdiction over the claim of the plaintiffs. The defendants then submit that as the claim relates to immovable property, property situate in a foreign country, the High Court of Justice has not jurisdiction over the same, and that to assume it would be a violation of the comity of nations, and that the contract having been made at Buenos Ayres, it cannot be conveniently investigated before the High Court. These are the substantial allegations upon which this portion of the statement of defence is founded, and by which the defendants seek to oust the jurisdiction of this court to entertain the claim.

Mr. Benjamin disclaimed any intention of arguing the case on any technical ground of venue. He rested his contention on higher grounds of policy and convenience and comity of nations. In looking carefully into the allegations made in the first six paragraphs of the statement of defence, I cannot find any allegation which claims or asserts exclusive jurisdiction in the courts of the Argentine Republic to entertain this matter; and although suggestions are made and hints given, there is no specific allegation which can be fairly so interpreted.

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It seems to me that, consistently with all these allegations, the plaintiffs are entitled to sue the defendants in this country in respect of the matters alleged in the claim. Both plaintiffs and defendants are in England, although they may be, as alleged, *domiciled in the Argentine Republic. [213] public, they are not aliens, and there is nothing stated as to the law of the Republic or the contract of the parties which is inconsistent with the power to sue in England. Both parties to the action are within the jurisdiction of the courts of this country, and the action, as far as procedure is concerned, has been properly initiated; and although it is alleged that, by the express provision of the laws of the Republic, powers of adjusting all rights arising out of the said construction properly applicable to the claim of the plaintiffs are vested in the government, that does not show that a contract by which a money compensation is agreed to be paid by the defendants to the plaintiffs for the beneficial use by the defendants of the plaintiffs' construction, may not be enforced before another forum. In short, I can find no allegation which asserts that jurisdiction over the subject-matter of the claim is, either by law or contract of the parties, vested exclusively in the courts of the Argentine Republic. When the allegations contained in the statement of defence are carefully analyzed, they amount to this only: that the contract was made in a foreign country, and that it relates to the use of property in such foreign country in which both parties have a domicile, and cannot be sued upon in this country, although both parties are within the jurisdiction of this court. The alleged convenience of one tribunal over another for the investigation of the claim is beside the question of jurisdiction; and as to the allegation that to entertain the claim in this country would be a violation of the comity of nations, or, as was argued by Mr. Benjamin, be disrespectful to the Argentine Republic, that is, in my opinion, an assertion without any authority, and I cannot regard it. Lastly, he contended that, in deciding upon this question, we are dealing with an act of state. I confess myself unable to follow or see the effect of that argument, or how it arises upon the facts as alleged. It is true that the statement of defence asserts that the government of the Argentine Republic has assumed jurisdiction over the plaintiffs' claim. I can see in that fact no act of state in the sense contended for by Mr. Benjamin, and it appears to me difficult to apprehend the effect of that allegation. A statement of defence which is intended by way of plea to the jurisdiction of the courts of this country, must be precise and clear,

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214] which is certainly not *the case with the allegations in question. I cannot, carefully reading the allegations in the statement of defence, find any obstacle to my giving judgment in favor of the demurrer.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Bircham & Co.*

Solicitors for defendants: *Ashurst, Morris & Co.*

[2 Queen's Bench Division, 214.]

Feb. 6, 1877.

THE SHEFFIELD NICKEL AND SILVER PLATING COMPANY,
Limited, v. UNWIN.

*Company—Agreement for Purchase of Business—Vendor guaranteeing Dividend—
Resolution to release Vendor from Liability—Fraud—Right to rescind.*

By agreement between the defendant and the promoters on behalf of an intended company the defendant agreed to sell to the company several patents belonging to, and several businesses carried on by, him. The company was incorporated under the Companies Acts, 1862 and 1867, the memorandum of association describing the objects of the company, amongst others, as the purchasing or acquiring the businesses and patents belonging to the defendant, and working the patents. The articles of association, which were dated and registered on the same day as the memorandum of association, set out the agreement with the defendant, and declared that it should be binding upon the company and read as part of the articles themselves. By the agreement itself, the defendant was to be chairman of the board of directors and managing director of the company for five years, and to be paid such salary as the company might determine. The purchase-money was to be paid the defendant, part in fully paid-up shares and the balance by instalments in money. The defendant on his part promised to guarantee to the company a minimum dividend of £15 per cent. on all the paid-up capital of the company. The company carried on the businesses for one year under the agreement, and the defendant paid them the amount sufficient to make up the £15 per cent. Shortly afterwards a resolution was passed by the directors and carried at a general meeting duly convened for the purpose, whereby the defendant was released from his guarantee upon surrendering his shares and giving up to the company his right to certain patents. The defendant retired accordingly from his office as director, giving up his shares and right to the patents, and the company proceeded to sell one of the businesses and one of the patents. The company afterwards claimed to set aside the resolution and enforce the guarantee, on the ground that the defendant had fraudulently misdescribed the property sold by him:

Held, first, that the resolution was not in excess of the powers of the company, and was binding on them: secondly, that assuming that the resolution had been passed in consequence of fraudulent misrepresentations on the part of the defendant, his position had been so far changed that it was too late for the company to repudiate their contract.

ACTION upon an agreement whereby the defendant guaranteed *to the plaintiffs a dividend on their paid-up capital of not less than 15 per cent. for five years from the 1st of June, 1873.

The material part of the pleadings and facts is contained in the judgment of the court.

At the trial, before Mellor, J., at the Leeds spring assizes, 1876, a verdict was found for the plaintiffs for £2,370 10s., with leave to move to enter judgment for the defendant, the court to have power to draw inferences of fact.

May 25, 1876. The case was argued upon motion for judgment before Cockburn, C.J., Mellor and Quain, JJ., who took time to consider their judgment, but in consequence of the death of Quain, J., the court ordered that the case should be reargued.

Jan. 22, 25, 1877. *Cave*, Q.C. (*Forbes* with him), moved for judgment, and cited *Riche v. Ashbury Carriage Co.* ⁽¹⁾; *Bonar v. Macdonald* ⁽²⁾; *Whitcher v. Hall* ⁽³⁾; *Morgan's Case* ⁽⁴⁾; *Smith v. Goldsworthy* ⁽⁵⁾; *Behn v. Burness* ⁽⁶⁾; *Pust v. Dowie* ⁽⁷⁾; *Clarke v. Dickson* ⁽⁸⁾; *Brown v. Brown* ⁽⁹⁾.

Waddy, Q.C. (*Barker* with him), for the plaintiffs, cited *Lindley on Partnership*, vol. i, 3d ed., p. 619; *Const v. Harris* ⁽¹⁰⁾; *Hutton v. Scarborough Cliff Hotel Co.* ⁽¹¹⁾; *Smith v. Hughes* ⁽¹²⁾; *Melhado v. Hamilton* ⁽¹³⁾; and the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 14, 15, 16, 17, 18, 50, 51.

. *Cur. adv. vult.*

Feb. 6. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J.: This is an action to recover the sum of £2,970 10s., the amount required to make up the second year's dividend to 15 per cent. upon the paid-up capital of the company, and it is based upon the guarantee of the defendant, contained in the *agreement of the 28th of May, [216 1873, whereby the defendant, as the vendor, guaranteed to the company a dividend on all the paid-up capital of not less than 15 per cent. per annum for five years from the first of June then next. The defence set up was, that by a resolution of the directors, sanctioned by an extraordinary general meeting of the shareholders, and duly confirmed, as required by the Companies Act of 1862, the company agreed to release him from all liability under his guarantee upon certain conditions, which he alleged he had performed. To this the plaintiff company replied, first, that the resolution was *ultra*

⁽¹⁾ Law Rep., 7 H. L., 658, 667.

⁽²⁾ 3 H. L. C., 226.

⁽³⁾ 5 B. & C., 269.

⁽⁴⁾ 1 Mac. & G., 225.

⁽⁵⁾ 4 Q. B., 430.

⁽⁶⁾ 3 B. & S., 751; 32 L. J. (Q.B.), 204.

⁽⁷⁾ 5 B. & S., 20, 33; 34 L. J. (Q.B.),

⁽⁸⁾ E. B. & E., 148; 27 L. J. (Q.B.), 223.

⁽⁹⁾ 35 L. T., 54.

⁽¹⁰⁾ T. & R., 518.

⁽¹¹⁾ 2 Dr. & S., 514; 34 L. J. (Ch.), 643.

⁽¹²⁾ Law Rep., 6 Q. B., 597.

⁽¹³⁾ 29 L. T., 364.

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vires the company, and therefore void; secondly, if not *ultra vires*, that the defendant had not performed the conditions.

The memorandum of association describes the objects of the company to be as follows:—

- First, the carrying on for profit or gain, of all or any or either of the trades or businesses of manufacturing, purchasing, selling, letting, or supplying silver, German silver, brass, electro-plated and Britannia metal wares and goods.

Secondly, “the purchasing or acquiring the several trades or businesses now carried on or belonging to John Unwin” (the defendant), “that is to say, the trade or business carried on by him under the style or firm of John Brook & Son, at the Globe Works in Sheffield,” and various other businesses specified.

Thirdly, the purchasing, acquiring, and working the several English and foreign patents granted or belonging to the said John Unwin in his own name or in the joint names of himself and John Walkland for the manufacture of self-acting fountains, or for the depositing of nickel upon metal, and preparing articles to be coated for the reception of the nickel coating respectively, and for the granting of licenses for the use of the said patents, or either of them, and the receipt of royalties therefrom.

Fourthly, the purchasing and taking assignments of any letters patent or other like instruments granted or to be granted for inventions which may appear conducive to the attainment of the objects of the company, or any of them, and the using, working, or adopting the several inventions for which the same are or shall be granted, or the taking any license or licenses under any such letters patent, or instruments for the using or working of any such inventions.

217] *Fifthly, the purchasing or taking on lease, or otherwise, for any estate or interest, any lands or buildings, or erecting any buildings, works, offices, fixtures, machinery, or other things in England or elsewhere, which may from time to time be deemed necessary or advantageous for carrying out the purposes of the said company.

Sixthly, the letting on lease or otherwise, and the selling or mortgaging, or in any way disposing of the real or personal property of the said company.

Seventhly, the entering into any arrangement with any other company, or any person or persons, for the purchasing or otherwise acquiring their or his business, or businesses being of a like nature with the business of the company, or some branch thereof; or for the purchasing

the co-operation of any such company, or person or persons, or any of their or his rights or property, or otherwise to amalgamate or make arrangements with any such company, or person or persons, for the purposes aforesaid.

Lastly, the doing all such other matters and things as are incidental or conducive to the attainment of the above objects.

The articles of association, which are dated and registered on the same day as the memorandum of association, begin with setting out in full the contract of sale of the business between the defendant and the promoter on behalf of the company, and the fourth article confirms and adopts the agreement, and declares it to be binding upon the company, and that it shall be read and construed with and as part of the articles themselves. Turning back to the agreement, we find the material terms of it, as bearing upon the question of *ultra vires*, to be—(7.) That the defendant shall be chairman of the board of directors, and managing director of the company for five years from the 1st of June, 1873, and shall, while such managing director, devote so much time to the affairs of the company as may be necessary for the efficient working and management thereof; and shall be paid from time to time such salary as the company may from time to time determine. (9.) The purchase-money to be paid to the defendant as follows, viz., £2,000 in fully paid-up shares, to be issued by the company in the name of the vendor, £1,000 in fully paid-up shares in the name of Marriott (of whom the defendant had agreed to purchase one *of the businesses to be transferred, upon which [218 nothing turns), and the balance in cash, namely, £2,500 on the registration of the company, £2,500 on the 1st of August then next, and the balance within six calendar months of the registration. Then comes the clause upon which the action is brought, and which is the only other material clause. It is in these terms: "The vendor will guarantee to the said company a dividend on all the paid-up capital of not less than £15 per cent. per annum for five years, from the 1st day of June next, with power for the directors of the said company to declare interim dividends." Some of the articles it is important here to advert to. The 13th article says that "the certificates of any shares which may be issued under special conditions shall indicate the special conditions under which the same shares are issued, and in case of the vendor's shares, the words 'not transferable, and subject to vendor's guarantee,' shall be considered to be a sufficient indication within the meaning of this article."

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The 14th article gives the company a first and permanent lien upon all the shares of any member for all moneys due from him to the company.

The 95th article ordains that the directors (who are named in the 94th article), other than the defendant, shall continue in office until the first general meeting; but the defendant shall continue for the term and upon the conditions mentioned in the agreement hereinbefore recited.

By the 96th article the qualification of a director was to be the holding of not less than fifty shares in his own right.

The 109th article provides for the removal of any director by special resolution, but the article was not to affect the defendant until after the 1st of June, 1878, or until he should at any time during that period fail to carry out any or either of the conditions set forth in the agreement, and on his part to be observed and performed.

The 129th article vests in the directors large powers, amongst which are power to enter into, or adopt and carry into effect, any contracts or agreements for any of the purposes of the company, upon any terms or subject to any conditions they may deem beneficial, and to alter, vary, or modify any of such contracts or agreements as they may think fit, to bring, defend, *compromise, refer to arbitration, and abandon legal and other proceedings and claims by and against the company, and the directors and officers of the company, or otherwise concerning the affairs of the company, and generally to adopt all other measures and do all such acts as they may consider advisable for the proper and efficient carrying on of the business of the company, or likely in any other respect to be advantageous to the company.

The 189th article, under the head "dividends," declares that "for five years from the 1st of June, 1873, dividends shall be made, and all acts and proceedings in relation thereto shall be done and taken, in accordance with the said agreement confirmed by article 4, and the several provisions herein contained in relation thereto shall operate subject to the provisions of the same agreement."

It will be useful, before we proceed to the state of things which led up to the alleged release, to review the position and rights of the shareholders on the one hand and the defendant on the other. The shareholders were to have the benefit of the defendant's services in managing for five years the businesses which it must be presumed he had successfully carried on, and the security of his guarantee that the business should yield, or that he would make up, a minimum dividend of 15 per cent., and his 200 fully paid-up shares,

which he was not at liberty to dispose of, were to stand as a security for the fulfilment of his contract. On the other hand, the defendant had the advantage of a largely increased capital to work with, from which all parties expected to realize large profits. He had 200 paid-up shares, upon which he was entitled to dividends, and the position of managing director with a salary for five years, from which position he could not be removed unless he failed to carry out the conditions of the agreement which on his part were to be performed. At the time of passing the resolution to release him the defendant had not made any default. He had managed the entire business of the company, and had paid the deficiency on the first year's dividend, so that on the 30th of April, 1874, when it was resolved to get the sanction of a general meeting to an arrangement which had evidently been agreed upon between him and his co-directors, and which included as one of its terms the release of his guarantee, *he could not have been removed from his [220 position of managing director.

But as early as February, 1874, we find, from the evidence, that one at least of the concerns was not working satisfactorily, and the directors were anxious to get rid of it.

On the 18th of February it was resolved, against the will and protest of the defendant, that "Mr. Unwin not having been able to meet with a purchaser for the business, and the directors feeling quite sure that the business carried on at the Rockingham Works is not paying, they deem it expedient to stop the manufacture of any goods but what are already commenced, and to dismiss all the work-people that they can manage to do without as soon as practicable." It does not appear whether this resolution was acted upon or not, but on the 28th of April the directors resolved that a "Meeting of shareholders be convened at an early date for the purpose of taking the sanction of the shareholders to dispose of the electro-plated and manufacturing business now carried on at Rockingham Works, and also to dispose of the premises."

On the 30th of April the directors met again, and passed the resolution which gave rise to the present litigation. The resolution is in these terms: 1st. "That a meeting of shareholders be convened at an early date for the purpose of taking the sanction of the shareholders to dispose of the electro-plated and manufacturing business now carried on at the Rockingham Works, and also to dispose of the above-mentioned premises. And we also recommend that our managing director, Mr. John Unwin, be released from his

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guarantee of 15 per cent. on the conditions named below, viz., that should the directors and shareholders free the managing director from his liabilities and responsibilities, he will surrender his 200 shares fully paid up, amounting to £2,000, and also give the right of five new patents, together with such assistance as may be required for the disposal of the estate, free of charge to the company."

2. "That in consideration of the surrender of seventy fully paid-up shares amounting to £700 by Mr. John Unwin, the managing director, a claim against him due to the company be cancelled."

It does not appear whether these seventy shares were part of the 100 shares issued to Marriott on special conditions or 221] not. Nor is it material to inquire. It is certain that they were no part of the 200 shares allotted to the defendant as vendor in his own name. At the meeting of shareholders convened pursuant to the foregoing resolution on the 11th of May, a report was presented by the directors, including the defendant, to the effect that the defendant had no means of paying the guaranteed dividend, and that his only available property consisted of his shares in the company and his interest in five new patents. The resolution, in its entirety, was thereupon put and carried, an amendment being rejected, and at a second meeting called for the purpose, the resolution was duly confirmed.

The defendant had no other shares than those which he agreed to surrender, and the effect of the arrangement therefore was, and probably the object of it, to compel the defendant to vacate his place at the board, the possession of fifty shares being a necessary qualification of a director. Accordingly, after the confirmation of the resolution, he retired, and another gentleman was appointed, who thenceforth acted as managing director. The certificates of the 200 shares were produced by the defendant at the meeting of directors when the resolution in question was passed, and were then placed in a cupboard in the director's office, and after the retirement of the defendant, were taken possession of by his successor and retained. No transfer of these shares to the company was ever given, nor was it at any time asked for. As we are to draw inferences, we are of opinion and find that the defendant was ready and willing to transfer and would have transferred them if he had been required to do so. Before stating our opinion upon the first point it will be convenient to complete the narrative of facts as disclosed by the evidence. On the 13th of May, two days after the first extraordinary general meeting, at which the

resolution to release was confirmed, and as if in anticipation of the defendant's retirement from the office of managing director, a resolution was passed by the directors that "Mr. John Unwin having proffered his services free of cost to assist in the disposal of the business, plant, &c., at Rockingham Works, we also appoint him manager of the nickel and bronzing department at Globe Works, under the direction of the board, and for such services rendered he shall be remunerated as the board may consider *desirable [222 from time to time; but to have no claim for services rendered otherwise than by a special resolution relating thereto by the board."

Some months after the defendant's retirement from office, and after a new managing director was appointed, the defendant was applied to for the five patents, and it then appeared that all he had was one patent and four provisional specifications, all of which were out of date, so that at that time he had not as to the four even an inchoate patent right to hand over. Upon this a meeting of the directors was held, at which they resolved "that inasmuch as Mr. John Unwin has not complied with the terms of a special resolution which released him from his guarantee of 15 per cent. on the called up capital of the company by giving up five patents, stated in the resolution as part of the terms of the said resolution, the directors consider the said resolution null and void." This resolution was sanctioned and confirmed by general meetings, and was served on the defendant before action brought. It was alleged at the trial that the defendant had wilfully misrepresented to the directors that he held five complete patents, but this the jury negatived, though they found that the directors so understood. They also found that it was part of the bargain that the defendant should assign five new patents, and that he never explained that four of them were only provisional specifications out of date.

Upon the first question, namely, whether the resolution to release was *ultra vires* the company, our judgment is in favor of the defendant. The resolution in no way affects the constitution of the company, as defined by the memorandum of association, but being, as it undoubtedly was, *bona fide* on the part of the directors and shareholders, who considered that they were doing the best for their own and the interests of the company, is in furtherance of the main object of the company. We doubt whether such an arrangement would not have been within the competence of the directors themselves in the exercise of the very extensive

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powers given them by the 129th article; but we are clearly of opinion that it was *intra vires* the company, and that the agreement to guarantee 15 per cent. cannot be put higher than a "regulation," which, by the 50th section of the Companies Act, 1862, the company had power to repeal or alter. It was strongly urged by Mr. Waddy that this was a vital clause, because persons intending to purchase shares would naturally look to the registered articles and be induced to trust to the guarantee which they would find there; but the answer to this is, that treating this clause as a "regulation" the repeal of it must be registered also, and thus appear to be, as in fact it was, an amendment of the original articles.

The argument on the second question presented the case of the company in a twofold aspect. The resolution to release was, it was contended, in terms conditional upon the defendant surrendering the shares and assigning five valid patents, and as this has not been done, the defendant could not set up the resolution as a bar; or, secondly, if not a conditional contract, it was a contract procured by fraud, inasmuch as the defendant knew that he had not five valid patents or patent rights to assign, and in this view of the case the company were justified in repudiating, and that they did repudiate as soon as they became aware of the fraud.

We think that in whichever aspect the contract is viewed neither of these arguments affords an answer to the defendant's case. A conditional contract ceases to be conditional when the party has received a substantial part of the consideration: *Behn v. Burness* ⁽¹⁾; *Pust v. Dowie* ⁽²⁾. A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*: *Clarke v. Dickinson* ⁽³⁾. For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages.

Now, the company, it is clear, accepted the 200 shares, treated the defendant in virtue of his surrender of them as no longer qualified to act as director, and appointed another managing director in his stead. By him the businesses were carried on for upwards of four months before the directors resolved to repudiate the agreement under which the shares had been given up. And in the meantime they disposed

⁽¹⁾ 3 B. & S., 751; 32 L. J. (Q.B.), 204.

⁽³⁾ E. B. & E., 148; 27 L. J. (Q.B.),

⁽²⁾ 5 B. & S., 20, 33; 34 L. J. (Q. B.), 223.

of one of the businesses, the *resolution for selling [224 which was part of the resolution of the 11th of May, which sanctioned the release of the defendant from his guarantee, and evidently part of one entire arrangement. They also sold one of the patents which was included in the original purchase, and they retained and had the benefit of the patent, one of the five, which was part of the consideration for the release. It is true they had not disposed of the shares, or the last-mentioned patents, nor had they taken a transfer of the shares; but it is clear that the return of these would not have restored the defendant to, or placed the concern in, the same condition in which he or it was at the date of the resolution to release. The position of both parties had been materially altered, and it was therefore too late in October to repudiate the contract.

For these reasons we are of opinion that this action, which is brought to enforce the guarantee, cannot be sustained, and our judgment must consequently be for the defendant.

Judgment for the defendant.

Solicitor for plaintiffs: *Hickin.*

Solicitor for defendant: *H. A. Maude.*

[2 Queen's Bench Division, 224.]

Jan. 22, 1877.

[IN THE COURT OF APPEAL.]

HOPKINS and Others v. THE GREAT NORTHERN RAILWAY COMPANY.

Ferry—Disturbance—Bridge—Railway Company—Compensation—Lands Clauses Consolidation Act (8 Vict. c. 18), s. 68—Railway Clauses Consolidation Act (8 Vict. c. 20), s. 6.

The owner of a ferry cannot maintain an action for loss of traffic caused by a new highway by bridge or ferry made to provide for a new traffic.

Quære, whether the exclusive right of the owner of a ferry extends beyond the carriage of passengers by boat.

A railway company, under the authority of their act, constructed across a river, half a mile above an ancient ferry, a railway bridge and a foot-bridge, the foot-bridge being used by persons going to the railway station and also to other places. The traffic across the ferry fell off, and the ferry was given up. The owners of the ferry claimed compensation under the Lands and Railway Clauses Acts.

Held, reversing the decision of the Queen's Bench Division, that no compensation *could be recovered: First, on the ground that an action could not have [225 been maintained for disturbance of the ferry in respect of the traffic either by the railway or by the foot-bridge, if they had been erected without the authority of an act. Secondly, on the ground that, the injury to the ferry being occasioned, not by the construction but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act or the Railway Clauses Act.

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ACTION by the plaintiffs, as owners of a ferry, against the defendants, for the recovery of £300, the amount of an award, made between the parties in a question of disputed compensation, by an umpire appointed in accordance with the provisions of the Lands Clauses Consolidation Act, 1845.

A case was stated for the opinion of the court as follows:—

1 and 2. Statement that the plaintiffs, as trustees of the will of Charles Boucher, were owners in fee of a certain ancient and exclusive ferry over the navigable River Nene.

3. Before and until the construction of the bridge by the defendants, as hereinafter mentioned, the ferry was extensively used for the conveyance across the river by the plaintiffs and their predecessors, owners of the said ferry, or their undertenants, of passengers by horse and foot, goods, horses, sheep, cattle, and carriages, and was, down to the said time, the only public means of communication within about six miles between the north and south sides of the river, which is at this spot navigable and about 100 feet in breadth. It increases in width towards its mouth, and for some miles upwards is of considerable breadth, and navigable for barges. It connects two high roads, the one to the north leading from the ferry to Wisbeach and Peterborough, and the other to the south from the ferry to March, Chatteris, and so to Ely and Cambridge.

4. By the Great Northern Railway (Spalding to March) Act, 1863, the defendants were authorized to make a railway from Spalding to March, and to make a bridge, footway, and works across the river in connection therewith.

5. The defendants, in pursuance of and in exercise of the powers contained in the said act, constructed a bridge and footway attached to it across the River Nene, which bridge and footway are on the west side of or above the said ferry, and are distant from the landing places of the said ferry about half a mile.

226] *5A. The said bridge and footway are physically independent of and unconnected with this said ferry, and in no way physically obstructed the same or the approaches thereof.

6. The bridge and footway are and have been, since they were opened by the defendants in or about the year 1867, used for the railway traffic of the defendants, and also for the passage of passengers on foot across the Nene to and from the station called "Guyhirn," situated on the south side of the said river. The said foot-bridge has not been dedicated to the public. The passage of stock, and sheep, and of barrows across the said footway is prevented by stiles placed

for the purpose at either end. Notices are put up near the bridge as follows (on the north side): "Great Northern Railway. Notice: Any person found trespassing on the railway will be prosecuted. By order. Alexander Forbes, secretary. November 4th, 1870." At the south end of the bridge a notice is fixed: "To the station only." There are no steps beyond these taken to prevent persons not intending to use the bridge as an access to the station from using it, and persons do in fact use it occasionally simply for the purpose of crossing the river.

7. The transit of goods, horses, sheep, cattle, and carriages is carried on by means of the defendants' trains, and such goods, horses, sheep, cattle, and carriages must be put upon their railway at some or one of their stations, the nearest of which on the north side is about two and a half miles, and on the south side is the Gnyhirn station adjoining the bridge and footway. In connection with the last-mentioned station there is also accommodation for loading trains at the north end of the bridge and footway.

8. Neither the said bridge and footway, nor any of the said works, communicate with the said ferry, inasmuch as it is half a mile distant, but persons travel by the trains on the said railway across the said bridge who otherwise would have used the said ferry as a means of transit. Stock, cattle, and sheep are also carried by the said railway over the said bridge which otherwise would have crossed the ferry.

9. Since the erection and opening of the bridge, footway, and *works, the traffic over the ferry of all descriptions, including foot passengers, fell off, and the franchise of the ferry, and the plaintiffs' interest therein, became less valuable, and they were compelled to reduce the rents received by them from the tenants of the ferry, and ultimately the ferry was given up.

10. In consequence of this prejudicial effect on the plaintiffs' ferry, the plaintiffs, on the 24th of February, 1872, caused to be served on the defendants a notice in writing stating therein the nature of their interest, their claim for compensation in respect of the injury thereto, and their desire to have the said question of disputed compensation settled by arbitration in accordance with the provisions of the statutes in that behalf.

The case then stated the proceedings under the arbitration, and the appearance of defendants under protest before the umpire, who made his award in favor of the plaintiffs for £300.

A plan was annexed to the case, showing a road on one

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side of the river leading from Peterborough to Wisbeach, and an approximately parallel road on the other side leading from March to Wisbeach, with the ferry affording means of passing from one of the roads to the other. The Lands Clauses Consolidation Acts and the Railways Clauses Consolidation Act were incorporated in the Great Northern Railway (Spalding to March) Act, 1863.

The question for the opinion of the court was, are the plaintiffs entitled to recover the sum so awarded?

May 9, 1876. The case came before the Queen's Bench Division (Blackburn and Quain, JJ.), who, being of opinion that it was governed by *Reg. v. Cambrian Ry. Co.* (¹), gave judgment for the plaintiffs.

The defendants appealed.

Nov. 10, 21, 1876. *Mellor*, Q.C., and *Monckton*, for the defendants: There is this distinction between this case and *Reg. v. Cambrian Ry. Co.* (¹), that there the company took toll for the use of their bridge; here the company only use the bridge for the purposes of their station. What they 228] have done has been done under the *authority of their act, and the injury, if any, to the ferry is by the working, not by the construction, of the railway, and is, therefore, not a subject for compensation under the acts: *Brand v. Hammersmith Ry. Co.* (²); *M'Carthy v. Metropolitan Board of Works* (³). But the plaintiffs also complain of injury by reason of the traffic in carriages and animals being taken away. That, however, is no subject for compensation: *Newton v. Cubitt* (⁴). The Legislature has thought fit to leave such cases unprovided for. If the railway had interfered physically with the ferry the damage would have been the subject of compensation under the acts, but that is not the case here. A ferry owner cannot stop all improvement by setting up an exclusive right to take people across a river for an indefinite distance.

F. M. White and *Silvester*, for the plaintiffs: There has been no change of circumstances, nor is this ferry in a populous place, as in *Newton v. Cubitt* (⁴). The ferry is from one high road to the other, and was granted for the convenience of the district, and is now given up. The owner of the ferry is bound to maintain the ferry, and has a right to the traffic. Even he could not put up a bridge: *Payne v. Partridge* (⁵). The plaintiffs do not want to stop any im-

(¹) Law Rep., 6 Q. B., 422.

(²) Law Rep., 4 H. L., 171.

(³) Law Rep. 7 H. L., 243.

(⁴) 12 C. B. (N.S.), 32; 31 L. J. (C.P.), 246.

(⁵) 1 Salk., 12.

provement, and want merely £300 to compensate them for the loss of their undoubted property, just as a landowner would be compensated. The injury is directly traceable to the execution of the powers given by the act. In *Brand v. Hammersmith Ry. Co.* ⁽¹⁾, the damage was remote; here it is direct, for every passenger who crosses the bridge would have crossed by the ferry: *Cory v. Yarmouth and Norwich Railway Co.* ⁽²⁾. A bridge could not be built to the injury of the ferry: *Letton v. Goodden* ⁽³⁾. In *Churchman v. Tunstal* ⁽⁴⁾ it was held that a waterman could not carry passengers across a river three quarters of a mile from a ferry: See also *Attorney-General v. Richards* ⁽⁵⁾; *Huzzey v. Field* ⁽⁶⁾. At all events, the plaintiffs have been injuriously affected within the Lands Clauses Consolidation Act (8 Vict. c. 18), *s. 68, and the Railway Clauses Consolidation Act (8 Vict. c. 20), ss. 6, 16, and are entitled to compensation.

Mellor, Q.C., in reply.

Cur. adv. vult.

Jan. 22, 1877. The judgment of the Court (Lord Coleridge, C.J., Mellish, L.J., and Brett and Amphlett, JJ.A.) was delivered by

MELLISH, L.J.: This was an appeal from a judgment of the Queen's Bench Division on a special case. [The Lord Justice read the material facts from the special case.] The Queen's Bench Division gave judgment in favor of the plaintiffs upon the authority of the case of *Reg. v. Cambrian Railway Company* ⁽¹⁾, and we agree that the present case, except in one point, which will be hereafter referred to, cannot be distinguished from that of *Reg. v. Cambrian Railway Company* ⁽¹⁾, and that we have to consider whether that case was rightly decided.

There are two questions to be considered: First, could an action have been maintained by the plaintiffs against the defendants, if the defendants' railway bridge and foot-bridge had been erected without the authority of an act of Parliament? And, secondly, if such an action could have been maintained, are the plaintiffs nevertheless prevented from recovering compensation, upon the ground that they have not suffered damage from the construction of the railway, but only from the user of the railway after it was constructed, and that the case is therefore governed by *Brand v. Hammersmith Ry. Co.*? ⁽¹⁾

⁽¹⁾ Law Rep., 4 H. L., 171.

⁽²⁾ 3 Hare, 593.

⁽³⁾ Law Rep., 2 Eq., 123.

⁽⁴⁾ Hardr., 162.

⁽⁵⁾ 2 Anstr., 603.

⁽⁶⁾ 2 C. M. & R., 432.

⁽⁷⁾ Law Rep., 6 Q. B., 422.

With respect to the first question, in *Reg. v. Cambrian Ry. Co.* (¹), it appears to have been admitted by the counsel for the company, that the owner of a ferry could have maintained an action against the owner of a railway not constructed under the authority of an act of Parliament in respect of the diversion of traffic from his ferry by the opening of the railway; and therefore the question, whether such an action could be maintained was very little considered; but Mr. Justice Blackburn says: "The prosecutor's right is to a ferry or franchise by which he had the exclusive right of carrying passengers across the river. It is well established that if that right is interfered with, without the authority 230] *of an act of Parliament, by something which carries passengers across so close to it as to disturb the right, an action would lie for that disturbance. The cases, so far as I remember them, in which actions have lain for the interference with or disturbance of the right of ferry, have been where there has been a carrying across by boats. But I cannot bring my mind to doubt the principle, that if a bridge were to be erected across a ferry, and people were to go across the bridge, and consequently the bridge would have the effect of disturbing the owner of the ferry in his right, he would be entitled to bring an action on the case and recover damages. It follows, I think, that what the railway company have here done, not only in making a bridge for carrying railway traffic across, but actually a footway, and taking toll from foot passengers for passing from one side to the other, if that had not been authorized by act of Parliament, would have been a disturbance of the ferry, for which the owner of the ferry could have brought an action on the case" (¹). In the present case, the railway company have erected and opened both a bridge to carry the railway traffic, and a foot-bridge, but the facts as to the user of the foot-bridge are different from what they were in *Reg. v. Cambrian Ry. Co.* (²); and it seems desirable to consider separately, whether an action could have been maintained in respect of the diversion of traffic by means of the railway bridge, and whether an action could have been maintained in respect of the diversion of traffic by means of the foot-bridge.

We will first consider that which is by far the most important, whether an action could have been maintained in respect of the diversion of traffic caused by the railway bridge. Now, in order that such an action may be maintained, it is clearly not sufficient for the owner of the ferry

(¹) Law Rep., 6 Q. B., at p. 430.

(²) Law Rep., 6 Q. B., 422.

to prove that something has been done by which traffic has been diverted from his ferry. He must prove that his right has been violated. He is the owner of a particular description of monopoly, which the law allows to be created from its being presumed to be for the public advantage, and to maintain an action he must prove that the defendants have in substance done that which he has the sole right to do. Now we apprehend that the owner of a ferry has not a grant of an exclusive right of carrying *passengers and goods [23] across the stream by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry. In *Payne v. Partridge* ⁽¹⁾ it was laid down, that the owner of a ferry could not himself build a bridge in substitution for the ferry; which seems a clear decision that he has not a grant of every mode of carrying goods and passengers across; for if he had he would surely be entitled, if not bound, to provide the best means of crossing. The first grantee of the ferry is supposed to have represented to the Crown that it would be for the public advantage that a ferry should be established in the particular locality, and then, in consideration of the grantee undertaking perpetually to keep up the ferry, the Crown has granted to him the exclusive right of ferrying within certain limits. There is nothing in the nature of this transaction which would lead me to believe that the Crown intended to guarantee, or had power to guarantee, the grantee of the ferry against changes of circumstances and future discoveries of an entirely different description of transit by which ferrying might be superseded. The Crown professes to protect the grantee against the competition of other persons who are in the same line of business and do the same thing that he does; but he appears to run the risk of any change of circumstances, which may render ferrying at that place useless.

There is no doubt, however, that the right of the owner of a ferry does extend somewhat beyond a mere right to bring an action against persons who have carried goods or passengers for hire by boat from one terminus of his ferry to the other, and it is necessary to examine the authorities for the purpose of seeing what the true limit of the right is. We have not been able to discover that any action has ever been brought by the owner of a ferry against any person for violating his right otherwise than by means of boats. The authorities, both old and new, are all collected in *Huzzey v. Field* ⁽²⁾ and *Newton v. Cubitt* ⁽³⁾, but they all relate to al-

⁽¹⁾ 1 Salk., 12.

⁽²⁾ 2 C. M. & R., 432.

⁽³⁾ 12 C. B. (N.S.), 32; 31 L. J. (C.P.), 246.

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leged infringements of the rights of the owner of a ferry by means of boats. They establish that although it is laid down in a very early case⁽¹⁾: "If I have a ferry by prescription, 232] and another erects *another ferry on the same river near to it by which my ferry is injured, that is a nuisance to me, for I am bound to sustain and repair the ferry for the ease of the lieges, otherwise I shall be grievously amerced;" and there are other authorities to the same effect; yet it does not conclusively follow, as a matter of law, that because a new ferry diverts some of the traffic from an old ferry it is actionable; and it may be that no action can be maintained in respect of the new ferry, if it has been set up *bona fide* for the purpose of accommodating a new and different traffic from that which was accommodated by the old ferry. In *Newton v. Cubitt*⁽²⁾ there were two counts, the first complaining that the defendants had carried passengers in the line of the plaintiff's ferry, the second that they had so done near the said ferry for the purpose of evading it; and Mr. Justice Willes, after showing that the defendants had not carried passengers in the line of the plaintiff's ferry, says: "The second count, charging that the defendants carried near the line of ferry for the purpose of evading it, raises another question. The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way; and if the alleged wrongdoer makes a landing place near to the ferry landing place, so as to be in substance the same, making no material difference to travellers, such a wrongdoer would be guilty of the wrong complained of in the second count; he would indirectly carry in the line of the plaintiff's ferry"⁽³⁾. Further on he says: "The principle by which to decide, whether the proximity of a new passage across the water to an ancient ferry is actionable has not been clearly laid down. It seems reasonable to infer that if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway; and it is obvious that the single landing place which sufficed for an uninhabited marsh would be utterly inadequate for several towns thronged with indus- 233] trial mechanics." Now this being the result *of the

⁽¹⁾ 2 Roll. Abr., 140.⁽²⁾ 12 C. B. (N.S.), at p. 59; 31 L. J.⁽³⁾ 12 C. B. (N.S.), 32; 31 L. J. (C.P.), (C.P.), at p. 253.

authorities, it seems to us by no means clear that a person building a bridge over a stream, even in the line of a ferry, would be liable to an action by the owner of a ferry. It is true that the opening a new bridge might be as prejudicial, or indeed much more prejudicial to the property of the owner of the ferry than the setting up of a rival ferry; but the one does and the other does not involve the direct doing of the very thing the exclusive right to do which has been granted to the owner of the ferry; and it seems to be extending the principle of liability for an indirect violation of the rights of the owner of a ferry to an unreasonable extent, to hold that it extends to make a person liable to an action, who has not ferried or carried passengers by boat at all.

This, however, is not the point which we have to decide. It may be that if a person built and opened a bridge in the line of a ferry, so as to enable persons and goods to be conveyed from the highway on which one terminus of the ferry was situate to the highway on which the other terminus was situate, he ought to be held to have indirectly violated the rights of the owner of the ferry: but that is not what the defendants have done. The railway bridge does not join the highway on which one terminus of the ferry is situate to the highway on which the other terminus is situate. The passengers and goods which are conveyed over the railway bridge do not use the highway on each side of the river adjoining the ferry at all. They use the railway as a substitute for those highways as well as a substitute for the ferry. How can it be said that the defendants, by opening an entirely new highway of a different description from the old highways and the ferry for the general accommodation of the public, have either directly or indirectly violated the plaintiffs' right, their right being to have the exclusive ferrying of goods and passengers from the one side of the river to the other in that locality? Then the passages we have cited from Mr. Justice Willes's judgment in *Newton v. Cubitt* (1) seem strongly in the defendants' favor. From what is there said it would follow, that even if the railway bridge had never been made, but the railway company had established a new ferry for the purpose of conveying goods and passengers from their railway on one side of the river to their railway on the other side, *it would not have [234 been actionable, for the railway would have been a new highway on land, which a change of circumstances had rendered necessary, and it would be reasonable that the new highway should be allowed to be continued over the water

(1) 12 C. B. (N.S.), at p. 59; 31 L. J. (C.P.), at p. 253.

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highway. It is true that there was not in this case, as in *Newton v. Cubitt* (¹), a change of circumstances in the immediate neighborhood of the ferry, which rendered the new highway necessary, but there was a general change of circumstances in the country at large which rendered this new highway necessary, not only or principally for the accommodation of the persons who formerly used the ferry, but for the accommodation of a much larger portion of the public; and we cannot think that it would have been illegal or a violation of the rights of the owner of the ferry to have given the public that accommodation, even if the railway had been made without the authority of an act of Parliament.

There is another consideration, which seems to us to be in favor of the defendants. If owners of ferries are held entitled to compensation, they will certainly form a singular exception to all other persons who were the owners of highways, or had a legal interest in the profits to be derived from the use of highways before railways were invented. It can hardly be necessary to enumerate the different classes of persons who had a legal interest in the old highways, and who have suffered loss from the diversion of traffic from those highways to railways; proprietors of canals, turnpike trustees, holders of turnpike bonds, trustees of river navigations, and holders of bonds secured on their tolls, have all suffered great losses from the diversion of traffic to railways and have received no compensation. No doubt their rights have not been infringed, though their property has been affected. They were all in substance the owners of particular kinds of highway. If any person used their highway without their permission and without paying their toll, the law gave them a remedy, but they had no remedy for a diversion of traffic caused by the invention of a better kind of highway. Is the owner of a ferry in a different position? We think he is not. We think he also is the owner of a particular description of highway, who is entitled to his legal remedy if anybody infringes upon his right, [235] or uses his highway *without paying his toll, but that he, like the others, must bear the loss occasioned by the diversion of traffic caused by the introduction of railways. Another class of persons interested in highways may be referred to, more analogous to the owners of ferries. The Crown had exactly the same prerogative respecting bridges that it had respecting ferries. Suppose that the Crown had, in consideration of a person undertaking to keep perpetually in repair a bridge over a stream carrying

(¹) 12 C. B. (N.S.), 32; 31 L. J. (C.P.), 246.

a highway, granted to such person and his heirs a reasonable toll in respect of all persons and goods passing over the bridge; or, in other words, assume the existence of a good toll thorough in respect of a bridge. The owner of the toll would be possessed of a franchise exactly similar to that of the owner of a ferry, and would be liable to be indicted if he did not keep the bridge in repair; but would he be entitled to compensation on account of traffic having been diverted from his bridge by a new railway? It is difficult to suppose that he would, for his right to receive toll in respect of all persons and goods passing over his bridge has not been violated in the least. On the whole, we are of opinion that no action could have been maintained by the plaintiffs in respect of the railway bridge if it had been opened without the authority of an act of Parliament.

We have next to consider whether the plaintiffs would have had a good cause of action in respect of the foot-bridge. Now the case finds that the company had charged no toll in respect of the foot-bridge, and only used it to enable passengers to get to and from their station, and assuming that an action might, under some circumstances, be maintained by an owner of a ferry for the disturbance of his ferry by the opening of a bridge, and that the indirect profit obtained by the company from the use of the bridge has the same effect as the charging of a toll, still we think that the case of *Newton v. Cubitt* ⁽¹⁾ is an authority that no action could have been maintained by the plaintiffs in respect of the foot-bridge. The foot-bridge was made expressly to provide for a new traffic in which the defendants had an interest, and was rendered necessary by a change of circumstances, and it seems to us that we should be overruling *Newton v. Cubitt* ⁽¹⁾, if we held that the defendants were obliged to compel all persons who wished *to cross the river to [236 or from the defendants' station to go round by the plaintiffs' ferry. The case, indeed, finds that some persons who were not going to the station used the foot-bridge to cross the river. We do not see how the defendants can be liable for the acts of trespassers, and if they were liable for the acts of trespassers, they would be liable to an action for not having prevented those persons from crossing the bridge, and not liable on account of their acts to pay compensation to be assessed under the Lands Clauses Consolidation Act. For these reasons, we are of opinion that the plaintiffs could not have maintained any action against the defendants, either in respect of the railway bridge or in respect of the

⁽¹⁾ 12 C. B. (N.S.), 32; 31 L. J. (C.P.), 246.

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foot-bridge, if they had been erected without the authority of an act of Parliament, and that consequently they are not entitled to maintain this action.

Having come to this conclusion, it is, strictly speaking, unnecessary for us to give any opinion on the second point; but as the second point is the one on which the judgment of the court below, both in the present case and in that of *Reg. v. Cambrian Ry. Co.* ⁽¹⁾, mainly proceeded, we have thought it right to consider it and give our opinion upon it. For that purpose we must consider what was the rule of law established by the case of *Brand v. Hammersmith Ry. Co.* ⁽²⁾, and determine whether the present case comes within the rule. Now, what was decided in *Brand v. Hammersmith Ry. Co.* ⁽²⁾ was that the owner and occupier of a house was not entitled to recover compensation from a railway company, in respect of the nuisance and actual structural damage to his house caused by vibration arising from the running of trains after the line was opened; and the ground of the decision appears to us to have been that a railway company is not bound to pay compensation for damage necessarily caused by the running of their trains in the way authorized by their act of Parliament after the line is opened to the public. The two learned lords who formed the majority of the House of Lords on that occasion carefully examined the different sections of the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act bearing on the subject, and from that examination came to the conclusion that compensation is only given for damage caused by the construction of the railway and works, and is not given for damage caused by the user of the railway after it has been constructed and opened to the public. Now, that being the rule so established, we are of opinion that the present case comes within the rule. It seems clear to us that the damage for which compensation is claimed in the present case has arisen solely from the user of the railway and works after they had been constructed and opened to the public, and has not arisen from the construction of the railway and works. In the case of *Reg. v. Cambrian Ry. Co.* ⁽¹⁾ the judges rely on the clause in the Lands Clauses Consolidation Act by which the word "land" includes "franchises." This, no doubt, proves that if franchises are injured by the construction of the railway or works—which they may be—compensation may be obtained, but surely does not prove that compensation ought to be given for damage caused to a franchise by the user of

⁽¹⁾ Law Rep., 6 Q. B., 422.

⁽²⁾ Law Rep., 4 H. L., 171.

a railway after it has been constructed, contrary to the rule in other cases. The court also relied upon this, that in *Brand v. Hammersmith Ry. Co.* ⁽¹⁾ the company had no intention to cause damage to Mr. Brand's house though damage was occasioned by their acts, but that in *Reg. v. Cambrian Ry. Co.* ⁽²⁾ it was the object of the company to divert the traffic from the plaintiffs' ferry. We cannot see why this should make any difference. It is impossible to deny that structural damage to a house was the proper subject of compensation, if the damage was caused by the construction of the railway; but compensation is not given because the damage is caused by the user of the railway, and not by its construction. If that be good law, why is there not to be some rule respecting franchises? If damage is caused to a franchise by the construction of a railway, as, for instance, if the approach to a ferry is blocked up by a railway embankment, compensation would be given, but we can see no reason why the owner of a franchise should have a greater right to compensation for damage caused by the user of a railway, as distinguished from its construction, than any one else. Then Mr. Justice Blackburn expresses an opinion that the construction of the railway may be treated as the proximate cause of the damage to the owner of the ferry, because the railway was constructed for the purpose of diverting the traffic *from the ferry. It [238 seems to us that the construction of the railway, as distinguished from the user of the railway after it was constructed, was not the proximate cause of the damage suffered by the owner of the ferry, for this simple reason, that if the railway and foot-bridge had only been constructed and never opened to the public or used, it is plain the owner of the ferry would have suffered no damage whatever. We are therefore of opinion that, in accordance with the judgment of the House of Lords in the case of *Brand v. Hammersmith Ry. Co.* ⁽¹⁾, the appellants are entitled to succeed.

The judgment for the plaintiffs must be reversed, and judgment entered for the defendants, with costs both in the court below and here.

Judgment reversed and entered for the defendants.

Solicitor for plaintiffs: *G. F. Smith.*

Solicitors for defendants: *Johnston, Farquhar & Co.*

⁽¹⁾ Law Rep., 4 H. L., 171.

⁽²⁾ Law Rep., 6 Q. B., 422.

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See 2 Eng. Rep., 493 note; 16 Eng. Rep., 73 note; 10 Eng. Rep., 24 note.

The vacation of a highway does not confer upon an individual residing thereon a right of action for the recovery of damages, even though he may suffer inconvenience or loss thereby.

Nor can the owner of abutting property recover damages for such a use of a street or highway as essentially deprives it of its character as a public highway: *Barr v. Oskaloosa*, 45 Iowa, 275; *Tuggle v. Mayor, etc.*, 57 Geo., 114; *Hyde Park v. Dunham*, 85 Ills., 570.

In the United States, where a corporation is granted an *exclusive* franchise, an action will lie against one who violates it, as such violation is an infringement of a constitutional right: *Chenango Bridge Co. v. Binghamton Bridge Co.*, 3 Wall., 51, 30 How. Prac., 346, reversing S. C., 27 N. Y., 87, 26 How. Prac. Rep., 124, 297; *Des Moines v. C. R. I., etc.*, 41 Iowa, 569.

But the right to do so must be expressly prohibited in the first grant: *Fort Plain Bridge Co. v. Smith*, 30 N. Y., 44.

Otherwise, where no *exclusive* franchise was granted, and there be no prohibition against another grant: *Turnp. Co. v. State*, 3 Wall., 210; *Fort Plain Bridge Co. v. Smith*, 30 N. Y., 44; *State v. Commissioner, etc.*, 38 N. J. Law, 473.

In the following states it is held under statute, or otherwise, that the owner of a lot abutting on a street is entitled to damages against a city altering the grade or increasing the use of a street, if he show that the municipal authorities, before he built upon his lot, had so improved or appropriated the street as to indicate fairly and reasonably that no future change would be made. As the charters of different cities in the same state vary, contradictory decisions in the same state do not necessarily indicate any contradictory rule.

See 16 Eng. R., 73 note; 2 Dillon's Munic. Corp., § 543.

Canada, Lower: *Joseph v. Montreal*, 21 L. C. Jur., 232.

Illinois: *Elgin v. Eaton*, 83 Ills., 535; *Pekin v. Brereton*, 67 Ills., 477; *Stack v. East, etc.*, 85 Ills., 377.

See *Shawneetown v. Mason*, 82 Ills., 337.

Iowa: See *Damour v. Lyons*, 44 Iowa, 276.

Kentucky: *Jeffersonville, etc., v. Esterle*, 13 Bush, 667.

Massachusetts: *Burr v. Leicester*, 121 Mass., 241; *Bemis v. Springfield*, 122 Mass., 110; *Lincoln v. Worcester*, 122 Mass., 119.

Minnesota: *McCarthy v. St. Paul*, 22 Minn., 527; *Karst v. St. Paul, etc.*, 22 Minn., 118, 23 Minn., 401.

Missouri: *Schumacher v. St. Louis*, 3 Mo. App. Rep., 297.

New York: *Hatch v. Bowes*, 54 How. Prac. Rep., 439.

Ohio: Independent of statute: *Youngstown v. Moore*, 30 Ohio St. R., 133, 142, and cases cited.

Pennsylvania: *New, etc., v. McChesney*, 85 Penn. St. R., 522.

Wisconsin: *Dore v. Milwaukee*, 42 Wisc., 109.

In the following are not liable:

16 Eng. Rep., 73 note; 2 Dillon's Munic. Corp., § 543.

Illinois: *Shawneetown v. Mason*, 82 Ills., 337; *Pekin v. Brereton*, 67 Ills., 477.

Massachusetts: *Jamaica, etc., v. Brookline*, 121 Mass., 5.

Minnesota: *Lee v. Minneapolis*, 22 Minn., 13; *Karst v. St. Paul, etc.*, 22 Minn., 118, 23 Minn., 401.

Nebraska: *Nebraska City v. Lampkin*, 6 Neb., 27.

New York: *Gallup v. Albany Railway, etc.*, 65 N. Y., 1; *Hatch v. Bowes*, 54 How. Pr. R., 439.

Pennsylvania: *New, etc., v. McChesney*, 85 Penn. St. R., 522.

Wisconsin: *Dore v. Milwaukee*, 42 Wisc., 109.

In the following cases a municipal corporation was held liable, because it was guilty of negligence in the performance of the work, resulting in *direct* injury to the abutter: *Shawneetown v. Mason*, 82 Ills., 337; *Pekin v. Brereton*, 67 Ills., 477; *Karst v. St. Paul*, 22 Minn., 118; *Dore v. Milwaukee*, 42 Wisc., 109; *Stack v. East, etc.*, 85 Ills., 377; *New, etc., v. McChesney*, 85 Penn. St. R., 522.

See *Gallup v. Albany, etc.*, 65 N. Y., 1.

[2 Queen's Bench Division, 238.]

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[IN THE COURT OF APPEAL.]

SANGUINETTI V. THE PACIFIC STEAM NAVIGATION
COMPANY.

Ship—Charterparty, Construction of—Cesser of Charterer's Liability—Waiver of Lien on Cargo at Request of Charterer's Agent—Charterer Consignee of Cargo—Demurrage—Damages for Detention—Stiffening Coal.

Statement of claim, that defendants chartered plaintiff's ship for a voyage from Cardiff to Callao with a cargo of coals, to be consigned to defendants' agent at Callao. By the charterparty the ship was to be loaded at the rate of 75 tons per day, commencing when she was wholly unballasted; stiffening coal to be supplied at the ship's expense at the rate of 40 tons per working day, all days on which stiffening coal was taken on board or the ship was detained for the same, to be excluded from the working days allowed for loading; the vessel to be discharged at the rate of 40 tons per day; demurrage to be paid for each day beyond the said days allowed for loading and discharging at the rate of 3d. per registered ton per day; the master to have a lien on the cargo for all freight and demurrage; all liability of the charterers to cease as soon as the cargo was on board; and all questions, [239 whether of short delivery, demurrage, or otherwise, to be settled with charterer's agent at the port of destination (which settlement to be binding on the owners); the owners and master to have a lien on the cargo for all freight, dead freight, and demurrage.

That the ship was detained by the default of the defendants in providing stiffening coal; that the cargo was ultimately loaded; that plaintiff requested the defendants' agent at Callao to settle the claims as to demurrage, &c., of the plaintiff, which he refused to do; but the defendants' agent required the plaintiff to deliver the cargo, which the plaintiff accordingly did, without enforcing his lien for demurrage. Plaintiff claimed £350 from the defendants for demurrage or damages for detention.

The defendants demurred to so much of the claim as alleged liability under the charterparty, on the ground that the liability of the defendants had ceased on the loading of the cargo:

Held, 1. That the demurrage clause applied to the loading of the stiffening coal as well as to the loading of cargo proper. But, 2. Even if it did not, the lien for "demurrage" would extend to damages for detention by not loading stiffening coal, as well as to demurrage proper. And therefore, 3. That the cesser of liability clause applied to liability in respect of both. 4. That the fact that defendants were themselves consignees as well as charterers made no difference in the construction of the cesser of liability clause. 5. That the rest of the clause, giving the defendants' agent power to settle claims for short delivery and demurrage, made no difference in the construction as to cesser of liability. 6. That the facts, that the defendants' agent refused to settle the demurrage, and that the plaintiff had delivered the cargo at the request of the defendants' agent without enforcing the lien, did not revive the defendants' liability under, or give rise to an action on, the charterparty.

STATEMENT of claim, that, on the 28th of December, 1874, a charterparty of the ship Guiseppe was entered into between the plaintiff, who was owner, and the defendants, for a voyage from Cardiff to Callao. The charter was set out, and the following are material parts: The ship to proceed to Cardiff and there load, in any dock ordered by shippers, a full cargo of steam coal from the colliery named by the charterers' agent on the vessel's arrival at Cardiff, and being

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so loaded, to proceed to Callao and there deliver the same, as ordered by charterers' agents (the act of God, fire, and all accidents of seas, &c., excepted), freight to become due on the right delivery of the cargo, and to be paid at the rate of 24s. per ton of 28 cwts., one-half by charterers' acceptance at four months from sailing of the ship, or in cash under discount, and the balance on unloading and right delivery of cargo.

240] **"The ship to be loaded at the average rate of 75 tons per clear working day (as tendered, during night and day), commencing when the vessel is in berth (under the tip where tips are used) wholly unballasted, and ready to receive cargo, notice of which is to be given in writing by the master to charterers' agent."*

Then followed a clause excepting from the calculation of working days the time lost by strikes or other causes beyond the control of the charterers.

"Stiffening coal, if required, to be supplied at the ship's expense, and at the rate of 40 tons per clear working day after written notice is given to the charterers' agents of its being required, but all days on which stiffening coal is taken on board, or the ship is detained for the same, are to be excluded in the computation of the said working days allowed for loading."

"The vessel to be discharged at the average rate of 40 tons per clear working day, after written notice is given to the charterers' agent of readiness to deliver. Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively, at the rate of 3d. per registered ton per day."

"The master to have a lien on the cargo for all freight and demurrage due under this agreement."

"All liability of the charterers under this agreement shall cease as soon as the cargo is on board (except as to the afore-said payment to be made on sailing), and all questions, whether of short delivery, demurrage, or otherwise, are to be settled with the manager or agents of the charterers at the port of destination (which settlement is to be binding on the owners); the owners and master to have a lien on the cargo for all freight, dead freight, and demurrage."

The claim then alleged that the ship proceeded to Cardiff, and was ready to receive stiffening coal on the 24th of February, 1875, of which notice was given to the defendants.

The whole of the ballast could not be taken out of the

vessel until the necessary stiffening coal should have been provided, and the usage was to discharge the greater portion of the ballast, and to retain a small quantity of ballast which is kept in the vessel *for the purpose of keep- [241 ing her upright, and this latter small quantity of ballast is discharged simultaneously with the receipt of the stiffening coal.

The defendants did not supply the stiffening coal according to the notice until the 14th of April, 1875, and the ship was thereby prevented from being wholly unballasted within the true intent and meaning of the charterparty until the 14th of April, 1875, and the plaintiff was also thereby prevented from giving such notice of the vessel being ready to receive cargo.

Although no time was lost by reason of any of the excepted causes or perils, &c., the defendants did not load the ship at the rate in the charterparty mentioned, and the defendants occupied and consumed forty-eight days over and above the time which it would have taken to load the ship at the rate aforesaid.

The defendants detained the ship forty-eight days over and above the period so agreed upon for loading as aforesaid, and thereby became liable to pay to the plaintiff £350 13s., for demurrage of the vessel, or for damages for the detention of the vessel.

The defendants ultimately loaded the agreed cargo on board the ship, and the plaintiff carried the same in the ship to Callao for the defendants, and there required the manager or agent of the defendants at the said port of destination to settle the several questions aforesaid, and to pay to the plaintiff the damages to which the plaintiff was entitled by reason of the several breaches of contract, and the said demurrage. But the agent refused to settle the questions, or to pay the damages or demurrage.

The defendants, by their manager or agent, in that behalf required and requested the plaintiff to deliver the said cargo, and he then delivered the same to the defendants without enforcing his said lien for demurrage, and the defendants then took delivery thereof accordingly.

Demurrer to so much of the statement of claim as alleges liability in respect of what took place in England, on the ground that it appears that the cargo was on board, and all liability of the defendants was by the charterparty to cease thereupon; and also on the ground that it does not appear that the said questions had been settled with the said manager or agents of the defendants.

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242] *1876. May 24. *Benjamin*, Q.C. (*Wood Hill*, with him), for the plaintiff.

Cohen, Q.C. (*Crompton*, with him), for the defendants, cited *Kish v. Cory* ⁽¹⁾, *Bannister v. Breslauer* ⁽²⁾:

MELLOR, J.: It is stated in the claim that the defendants by their manager or agent required the "plaintiff to deliver the cargo, and he delivered the same to the defendants without enforcing his lien for demurrage, and they then took delivery thereof accordingly." There was no fresh bargain, and I confess myself bound by the authority of the cases cited by Mr. Cohen, that the meaning of the contract was that all liability of the defendants on the contract should cease.

QUAIN, J.: We must give a full meaning to the cesser clause, and that cesser clause, in words similar to these, has been construed hitherto to get rid of all liability for detention or for demurrage at the port of loading in England. Looking at the statement of claim, it seems to me clear that, as to the forty-eight days, an action for demurrage or detention is got rid of by the cesser clause. I should be disposed to act upon the judgment of Brett, J., in *Kish v. Cory* ⁽³⁾, and to hold that the detention of a ship under these circumstances must be treated as demurrage and be within the lien clause. Then with regard to the demurrer, Mr. Benjamin argued, as I understand, that the personal liability of the defendants is disposed of, and a lien given; but that, if after that the defendants ask him to waive his lien, and to give up the goods, that revives the personal liability. I do not think that argument can be sustained. The giving up the personal responsibility remains still in the contract, and the only thing the shipowner could do was to enforce his lien or make a fresh bargain on the waiver of it. There must be judgment for the defendants.

From this judgment the plaintiff appealed.

Dec. 1. When the appeal came on to be heard, some discussion arose as to the form of the demurrer, and of the 243] pleadings *generally. It was admitted that the conduct of the charterers' agent at Callao, as alleged, might disclose a fresh cause of action independent of the liability arising out of the charterparty, which would have to be tried hereafter, and that this cause of action was not covered by the demurrer; but it was agreed that the alleged refusal of the agent to settle the questions of demurrage at Callao, and the delivery of the cargo to him at his request without enforc-

⁽¹⁾ Law Rep., 10 Q. B., 553, and per Brett, J., at p. 560.

⁽²⁾ Law Rep., 2 C. P., 497.

⁽³⁾ Law Rep., 10 Q. B., at p. 560.

ing the shipowner's lien, so far as they affected the liability of the defendants under the charterparty, should be considered as included in the demurrer, although they did not "take place in England."

Benjamin, Q.C. (*A. Russell* with him), for the plaintiff: On the true construction of this charterparty the present claim is not included in the lien clause, and consequently not included in the cesser of liability clause. The lien clause only mentions "demurrage;" this claim, although called a claim for demurrage, is a claim for damages for detention. Demurrage is a technical term which only applies when there is a specific number of lay days allowed, and then a specific number of days allowed for demurrage at a certain rate. In this charterparty there is no such stipulation. At any rate, demurrage is only applicable to delay in loading the cargo; but here the delay was in unballasting the ship, and putting in the stiffening coal, which was no part of the cargo. The charterer, therefore, was not intended to be relieved from liability in respect of this detention: *Kish v. Cory* ⁽¹⁾; *Lockhart v. Falk* ⁽²⁾; *Francesco v. Massey* ⁽³⁾. But supposing the present claim for detention is included in the lien clause, the defence set up by the grounds of demurrer is unreasonable and unprecedented. This case differs from all others reported on this subject, inasmuch as in all other cases the charterer and the consignee of the goods were different persons. The general custom is for the merchant abroad to employ a correspondent in England to charter the ship and consign the goods to him. The charterer has no interest in the matter after the ship has sailed. But here the charterers and the consignees are the same persons, and they stipulate that instead *of paying the freight, [244 and demurrage, and other charges in England, their agent, who will receive the goods, shall settle them at Callao. The word "settle" must include payment. The agent was to pay the freight and other charges and receive the cargo. The claim for cesser of liability was conditional on his doing this. He refuses to settle, and induces the captain to deliver the cargo to him. Surely, it cannot be said that the liability of the charterers, who are also the owners of the cargo, is thereby released. The lien on the cargo was only a collateral security, and the plaintiff can give that up without giving up his right to the debt.

Cohen, Q.C. (*A. Williams* with him), for the defendants: It may turn out on the evidence that the agent at Callao had

⁽¹⁾ Law Rep., 10 Q. B., 553.

⁽²⁾ 10 Ex., 132.

⁽³⁾ Law Rep., 8 Ex., 101.

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authority to bind the defendants by a fresh promise to pay, and that he did make such promise; but that is a fresh cause of action which is not covered by this demurrer. This demurrer only extends to all claims under the charterparty. With respect to the word "demurrage," it has been decided that where special days for demurrage are not mentioned in a charterparty, the lien for demurrage includes all detention in port, whether at the port of loading or at the port of discharge: *Bannister v. Breslauer* ⁽¹⁾; *Francesco v. Massey* ⁽²⁾; *Kish v. Cory* ⁽³⁾. There is no distinction between coal for stiffening and coal for the ordinary cargo; whenever the days for loading end, the days for demurrage begin; this claim for detention is therefore included in the lien clause, and consequently in the cesser of liability clause. That clause is not conditional, but absolute.

[BRETT, J., referred to *French v. Gerber* ⁽⁴⁾.]

There is no distinction made in the reported cases between cases where the charterer and consignee are the same person and where they are different; nor is there any distinction in reason. In either case the shipowner gives up all his right of action against the charterer in exchange for his lien on the cargo, and if he waives the lien, the right of action will not revive. The word "settled" does not include payment. It was necessary to give the agent the power of settling disputed charges on both sides; *but the shipowner looked only to the cargo for payment; and the agent would deduct the short delivery from the freight.

A. Russell, in reply, referred to *Gray v. Carr* ⁽⁵⁾.

MELLISH, L.J.: The question in this case depends upon whether, according to the true construction of this charterparty, the defendants were liable to pay either demurrage or damages for detention in respect of the ship having been detained for a greater length of time than at the rate of forty tons a day for loading what was called stiffening coal, and the demurrer in terms appears really to raise the question whether they were liable in respect of a cause of action which arose immediately on the detention having accrued in England. We thought, in order to settle the question fully between the parties, it was desirable also to consider the question whether any cause of action on the charterparty would arise in respect of that demurrage, or damages for detention, in the event of the charterers' agent not settling for it when the ship arrived at Callao. The clause respect-

⁽¹⁾ Law Rep., 2 C. P., 497.

⁽²⁾ Law Rep., 8 Ex., 101.

⁽³⁾ Law Rep., 10 Q. B., 553.

⁽⁴⁾ 1 C. P. D., 737; since affirmed by the Court of Appeal, Feb. 6, 1877, 2 C. P. D.

⁽⁵⁾ Law Rep., 6 Q. B., 522.

ing demurrage, which I will refer to first, is this: "Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively, at the rate of 3*d.* per registered ton per day." Now the first question I will consider is, whether the word "loading" in that clause is confined to the loading of the ship, at the rate of seventy-five tons per day, after the stiffening coal has been put in and all the ballast taken out, or whether it includes the putting the stiffening coal on board, so that if the ship is detained in respect of furnishing the stiffening coal a greater time than would be occupied at the rate of forty tons per day, there is an agreement to pay damages at the rate of 3*d.* per registered ton per day in respect of that demurrage. The charter says: "The ship is to be loaded at the average rate of seventy-five tons per clear working day, commencing when the vessel is in berth under tip, wholly unballasted, and ready to receive cargo, notice of which is to be given in writing by the master to charterers' agent." Now, I agree that that time does not begin until after the stiffening coal has been put on board, because the ballast is not to be entirely taken out until the stiffening coal has been put on board. Then there is the clause: "Any time lost by reason of *riots, strikes, &c., to be excluded in the compu- [246 tation of the said working days." Then it says: "Stiffening coal, if required, to be supplied at ship's expense, and at the rate of forty tons per clear working day after written notice is given to the charterers' agent of its being required; but all days on which stiffening coal is taken on board, or the ship is detained for the same, are to be excluded in the computation of the said working days allowed for loading." Thus it appears that the days occupied in putting on board the stiffening coal are not to count in the loading days, which loading is to be done at the rate of seventy-five tons per day. But if you look at the substance of what the parties meant, it is plain enough that they meant, if stiffening coal was required it was to be loaded at the rate of forty tons per day, and after that, when the ballast has been taken out, the cargo was to be loaded at the rate of seventy-five tons a day. In my opinion, they are separated because one is to be at the one rate of forty tons per day, and the other is to be at the other rate, namely, of seventy-five tons per day.

Then, after giving the rate at which the vessel is to be discharged, it says: "Demurrage to be paid for each day beyond the said days allowed for loading and discharging respectively;" and if the stiffening coal is part of the load-

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ing, then each day during which the forty tons is to be put in is one of the days; and when we look at the sense of it, why is not the shipowner to receive his 3*d.* per registered ton per day just as much if there is delay in the days allowed for loading the stiffening coal? If he cannot go on, or does not choose to go on, without stiffening coal, why is he not to receive his 3*d.* per registered ton per day just as much for that as in respect of any delay that may occur in the seventy-five tons per day? To suppose the contrary is absurd. It may be added that here there is no number of lay days mentioned in the charter; it does not say ten, or fourteen, or any particular number of days for loading, but whatever time is occupied beyond the rate of forty tons per day while loading stiffening coal, and beyond the rate of seventy-five tons per day while loading the rest of the cargo, is to be paid for, however long or short. I can see no reason why that should not apply to any delay or detention in loading the stiffening coal, as well as to detention in loading the other, though, after all, it makes no difference, in my 247] opinion, *even if the construction were otherwise, because the next clause is, "The master to have a lien on the cargo for all freight and demurrage due under this agreement." The real question we have to decide is, what is the meaning of "demurrage" under that clause? In my opinion, when we look at the whole charter, that must have meant to include damage by the detention during the loading of the stiffening coal, as well as during the loading of the other cargo. It would be a very awkward construction to make the word "demurrage" mean two things in these two clauses which come directly one after the other, and as a means of avoiding that, the proper construction is to say that the demurrage in both of them extends to the detention beyond the supposed time while the stiffening coal is being loaded, as well as to the supposed time for loading the rest of the cargo.

That being so, then, we come to the clause which discharges the charterer from liability. "All liability of the charterers under this agreement shall cease as soon as the cargo is on board, except as to the aforesaid payment, to be made on sailing." Stopping there, those are the words on which a construction has been put in numerous cases, and it is quite clear that, according to the authorities, they cannot be confined to a liability arising from breaches subsequently to the loading, but they include all liability under the charter of every description. That is the *prima facie* meaning, and therefore they include all liability, and, in my

opinion, include the liability in respect of the demurrage for detaining the ship after the stiffening coal had been put on board, as well as damages for detaining the ship during the loading of the stiffening coal. Then it goes on, "And all questions, whether of short delivery, demurrage, or otherwise, are to be settled with the manager or agents of the charterers at the port of destination, which settlement is to be binding on the owners, the owners and the master to have a lien on the cargo for all freight, dead freight, and demurrage."

Now, what is the meaning of the word "settle?" Does it mean to revive the liability which has been taken away in terms by the previous clause, which says, "All liability under this agreement shall cease?" In the first place, if it did, it would make the two clauses contradict one another; it would revive and continue, in *fact, that which [248 would not have been begun, because the construction practically would be that a liability was not to arise until the charterers' agent had refused to settle. In my opinion, the word "settle" does not import that there is a contract on the part of the defendants to pay by means of their agent. I think the contrary is shown from the clause immediately following, that the plaintiff is to have a lien for all freight, and dead freight, and demurrage; and in my opinion, notwithstanding the consignors and consignees are the same persons, and notwithstanding the cargo is to be delivered to the defendants themselves through their agents, still the clause does mean that the plaintiff is to bring no action at law at all, after the ship is fully loaded, against the charterers on the charter, that he is to have as a remedy for his freight, dead freight and demurrage, nothing but a lien on the cargo. The clause says that all claims for short delivery are to be settled in the same manner. A claim for short delivery is in fact a cross-claim, it is a claim by the charterers against the shipowner in respect of the shipowner not delivering the full quantity of cargo which is loaded on board, and I think it means that this is to be settled by the charterers' agent at Callao; he is to settle it, as I understand, by deducting it from the freight before the cargo is delivered. This seems to me to be the plain and natural meaning of the words which the parties have used, having regard to the construction put on clauses of this kind by a great variety of cases, and I do not think these words about the settlement or the fact that the coals were delivered to the charterers' agent, furnish any reason why we should put a different construction on them. There may have been

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reasons why the defendants wished to make the shipowner compel their agent, who, I suppose, had been receiving a large quantity of money for them, to settle with him, so that they might not have the trouble of doing it themselves. Therefore it seems to me that the true meaning of this contract is that there was to be no liability on the charterers at all after the loading of the cargo.

Now in the statement of claim it is alleged that the defendants themselves, by their agent or manager, requested that the cargo might be delivered to them without enforcing the lien. If that is true, that may possibly give rise to a right 249] on the part of the *plaintiff wholly independent of the charter, but it would be a contract *dehors* the charter. Mr. Benjamin said he did not claim on the present occasion, or wish for any decision about, any right he might have independently of the charter, therefore we give no opinion, one way or the other, in respect of any claim that there may be against the defendants on account of their agent or manager having requested that the cargo should be delivered without the lien for demurrage having been enforced.

In my opinion, according to the true construction of the charter itself, the defendants were free from all liability on the ship sailing after it was fully loaded. In my opinion the liability did not revive merely because no settlement was come to with the charterers' agent, and the shipowner ought to have enforced his lien. On those grounds I am of opinion that the judgment of the Queen's Bench Division ought to be affirmed.

BRETT, J.A.: In my opinion this demurrer is confined to any right of action arising on the charterparty, and if the statement of claim does, upon proof by evidence, enable the plaintiff to sustain any action against the defendants which is not an action in right of the charterparty itself, this demurrer is not pointed to any such right. Therefore if the plaintiff can sustain any right of action within the allegations of this statement of claim against the defendants by reason of anything which their agents did, under their authority, that is still open to him; and the only question we have to determine, and the only question which the Queen's Bench Division determined, was, whether there was a right of action on the charterparty.

Now with regard to that, I have come to the conclusion that there is no action at all by the plaintiff against the defendants on this charterparty.

In the first place, I agree that the claim here is within the

demurrage clause; and I think that is so, whether the stiffening coal is in some sense to be considered as part of the cargo, or whether it is not. Mr. Benjamin admitted that it was part of the cargo; but I am not sure after all that it is so, because I observe that the stiffening coal is to be supplied at the ship's expense. However that may be, the way the matter strikes me is this: Where a ship is *char- [250 tered to carry goods on a voyage, the time of the occupation of that ship depends partly upon the conduct of the charterer and partly upon the conduct of the shipowner; the length of time occupied by the ship on the voyage mainly depends upon the accident of the wind and weather, but partly upon the conduct of the shipowner; the time occupied before the voyage certainly depends in some measure upon the conduct of the charterer, because the charterer is always to supply a cargo to be loaded. So at the other end of the voyage, the time during which the ship is or may be occupied will depend upon whether the charterer, or his consignee, is there ready to receive the cargo. Now as to the time of the occupation of the ship at the beginning and the end of the voyage, that part of it which depends on the conduct of the charterer or consignee is generally provided for by what used to be called the lay days. The lay days are those days during which, though the ship is detained by the conduct of the charterer or consignee, the shipowner is not allowed to make any claim in respect of the occupation of his ship, beyond the freight. Therefore in every charterparty you require a number of lay days to be fixed—lay days at the commencement of the voyage and lay days at the termination of the voyage.

Now, there are two ways of fixing the number of these lay days, one is to estimate the number of days which will be fairly required, and to state those in the charterparty, as, for instance, that for the loading and unloading of the ship twenty-eight lay days shall be allowed. But another mode is that which was followed in this case, which is by the use of certain phraseology which will become applicable according to circumstances, so as to arrive at the number of lay days that are to be allowed for the loading of the coals; and in this case the lay days at the commencement of the voyage, which may depend upon the conduct of the charterer, will be regulated by the quantity of coal which he will provide for the loading of the ship day by day, and which he is bound to provide, although at the expense of the ship so far as the stiffening of the ship is concerned. The number of days which the ship may be occupied at the port of load-

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ing will therefore depend on the conduct of the charterer. Instead of naming the days, the capacity of the ship not 251] being, perhaps, exactly known, certainly the *quantity of stiffening she would require not being known, the number of lay days are here fixed by a phraseology which will become applicable according to circumstances, and will be ascertained as soon as the ship arrives and before the loading begins. If, when the ship arrives at the port of loading it is found she is a ship that will carry a certain number of tons of coal, the first thing to be done is to divide the quantity of coal she will carry by seventy-five, that will give you a certain number of lay days; then you must take the quantity of coal which will be required for stiffening and divide that by forty. That will give another number of lay days. Add those two numbers of lay days together and you will get the number of lay days allowed for this ship at the port of loading, and the construction of the charterparty is the same as though that number of days had been originally written in the charterparty as the number of lay days. Then that being so, the charterparty goes on to say if the ship is detained,—of course it being always understood by the default of the charterer,—beyond those days, for however long she may be detained beyond the lay days, demurrage is to be payable. Therefore, it seems to me, that consideration shows that all the days of detention beyond those lay days allowed at the port of loading are to be paid for by demurrage; and that would bring the whole case within the demurrage clause.

The question of whether payment or compensation to be made for days over the lay days is to be considered as demurrage, or whether it is to be considered as detention, generally depends upon this, whether there is a fixed number of demurrage days mentioned in the charterparty, because if there is a fixed number of demurrage days beyond lay days, and the ship is delayed by the fault of the charterer, then the detention beyond that is what is called a detention, to be compensated for by damages; but here the number of demurrage days is not mentioned at all, and, therefore, all the detention beyond the lay days seems to me to be demurrage, and quite within the demurrage clause. Therefore, whether the stiffening coal be part of the cargo or not, all the days beyond the aggregate number of days to be allowed the charterer for loading the ship and for supplying stiffening coal, if required, are demurrage days, and 252] are within the demurrage clause. *But if they were not, and if the demurrage clause were to be confined to a

certain number of days, I should entirely agree that in the clause which gives a lien demurrage is to be enlarged, and will not only include demurrage days proper, but also days of detention where a claim is to be made in the nature of demurrage.

I therefore come to the conclusion that in this charter-party there is a lien for the detention of the ship at the port of loading. There was, therefore, a right of lien in the hands of the captain upon this cargo in respect of the claim for which this statement of claim is framed, that is, for detention. If that be so, whether the decision in the late case of *French v. Gerber* ⁽¹⁾ is adopted or not, about which, therefore, we need not give an opinion, the absolving clause here, unless it is to be distinguished from the absolving clause in other charterparties in former cases, will clearly, according to the authorities, absolve the defendants from any claim in respect of any detention at the port of loading, and that will reduce the question in this case to be, whether the latter part of the clause does modify the former part so as to make it different from the other cases.

For a moment I was struck certainly with the observation or suggestion that here there were questions of short delivery which were to be dealt with at the port of discharge, and certainly for short delivery, in whatever sense you take it, there can be no lien on the part of the shipowner; but when you come to look at this it seems to me that the short delivery here spoken of would be a claim by the charterer against the shipowner, as Mr. Cohen has contended. But supposing there is a short delivery, the charterer not only in general affirms that he is not bound to pay freight in respect of that which is not delivered, but that he is also entitled to make a claim upon the captain for not having delivered a full and complete cargo; and I entirely agree, as far as I know, that although it is not the case in strict law, yet in ordinary practice that matter is usually settled at the time of the delivery of the cargo, and upon the terms that freight shall be paid in respect of the quantity that is short, but that the value of it shall be deducted from the whole freight which is payable in respect of the full delivery. It appears to me, therefore, that this question of *short delivery is one which is to be determined by [253 the agent at Callao, and is a stipulation in favor of the charterers.

There is another question which the agent of the charterers at Callao may be the person most qualified to determine,

⁽¹⁾ 1 C. P. D., 737; since affirmed by the Court of Appeal, 2 C. P. D.
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and that is the question of demurrage at the port of discharge. If there is any dispute about the extent of that demurrage, the number of days which the captain may be kept or not, that is a thing that may be well settled by the charterers' agent there. In this charterparty he is given power to settle both those questions against the shipowner. If, therefore, there was such a dispute as this, whether the captain was to be entitled to claim ten or fifteen days demurrage at the port of discharge, the agent might determine on only ten, nevertheless the captain might insist on fifteen days, and might refuse to deliver the cargo unless he were paid for fifteen. In such a case the defendants say the decision of the agent is to be binding on the shipowner, and if the captain did detain the cargo for such a reason, the shipowner would be liable for that act of the captain. If the charterers paid the fifteen days' demurrage in order to get delivery, then the five days would have to be paid back, because the decision of the agent would be binding on the shipowner. This clause, therefore, was probably drawn with reference to the demurrage at the port of discharge, but then, by reason of the generality of the words of it, we must not confine it to that, and it is applicable to ordinary demurrage at the port of loading. If there were a dispute between the captain and the charterers as to the number of days upon which demurrage was due at the port of loading, information being given to the agent abroad, I apprehend under this clause he might settle that too. But all these are settlements of questions which may be come to before the captain is to give up his lien at all, and it is not inconsistent with them that the ordinary meaning should be given to the other part of the clause, namely, that all liability of the charterers should cease, and that the shipowner has made up his mind, consistently with all the cases that have been decided, to rely upon his lien alone as his remedy.

This construction seems to me to give effect to all parts of the clause, and I am, therefore, of opinion that the Queen's Bench Division is right. But it is expressly to be understood that in *so deciding we do not in the least determine whether or not, upon circumstances which arose at Callao, the plaintiff has a right of action, either against the present defendants or against the defendants' agent at Callao, independently of the charterparty.

AMPHLETT, J.A.: I am of the same opinion. Treating the demurrer as confined to the cause of action under the charterparty, I do not propose to repeat the reasons which have been clearly given by the Lord Justice and my

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Brother Brett. I only say I entirely adopt those reasons, and I agree that the decision of the court below should be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *Ingledew, Ince & Greening*, for Ingledew, Ince & Vachell, Cardiff.

Solicitors for defendants: *Field, Roscoe & Co.*, for Bateson & Co., Liverpool.

[2 Queen's Bench Division, 254.]

Feb. 27, 1877.

EVERSHED V. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—Undue Preference—Gratuitous Carting—Loading and unloading of Customer's Goods, in order to prevent Traffic from passing over other Railway—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 90—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2.

The plaintiff was a brewer carrying on business at B., where the defendants, a railway company, and the M. Company, another railway company, had stations. Three firms of brewers also carried on business at B., and their premises respectively were connected with the M. Railway. The plaintiff's premises were not connected with the M. Railway. In order to prevent the traffic of the three firms from passing wholly over the M. Railway, and to divert some portion of it to their own line, the defendants carted goods gratuitously between their station at B. and the premises of the three firms respectively, and they also allowed certain deductions from the rates charged to the three firms for the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the defendants gratuitously. The defendants did not cart goods gratuitously for the plaintiff between his premises and their station, and they did not allow to him deductions similar to those allowed to the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before-mentioned, the defendants derived a profit from the traffic, and they had not any intention to prejudice the plaintiff:

Held, that the gratuitous carting, loading, and unloading of the goods for the *three firms was an undue preference granted to them by the defendants, [255 and was in contravention of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendants which represented the cost of carting his goods between his premises and their station at B., and of loading and unloading the same.

ACTION to recover the sum of £1,356 8s. 7d., in respect of alleged overcharges by the defendants as carriers of goods by railway for hire. By the consent of the parties, and by a judge's order, a case, of which the following are the material facts, was stated by an arbitrator for the opinion of the court:—

1. The plaintiff is a brewer, carrying on business at Burton-on-Trent.

2. There are three railway companies, who have stations in and carry goods to and from Burton, the defendants, the

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Midland Railway Company, and the North Staffordshire Railway Company.

3. The premises of the plaintiff are not connected by sidings with the stations or lines of railway of either of the three companies.

4. In the case of those brewers whose premises are not connected with either station or railway, the three railway companies charge what is called a station-to-station rate, which includes, in the case of goods carried from Burton, the service of unloading them from the carts at the goods station at Burton, the service of loading them on railway trucks, and providing the necessary station accommodation, and the service of carrying them to the station of destination, and in the case of goods carried to Burton the service of conveying the goods from the station at which they are received to the goods station at Burton, the necessary station accommodation at Burton, and the services of unloading them from the railway trucks on to the railway companies' wharves, and of sorting and loading them on carts for delivery in Burton. The brewers themselves, in many instances, convey the goods between their premises and the goods stations of the three railway companies. The railway companies are also ready to perform this cartage; and when they do perform it, they make, except as hereinafter stated, an additional charge to the brewers beyond the station-to-station rate of 1s. per ton for such service. Such charge of 1s. is a fair equivalent for the service so performed.

256] *5. In the case of those brewers whose premises are connected by sidings with either station or railway, the companies make a difference: Before the goods trains arriving at Burton enter the goods station, they are placed on sidings belonging to the railway company, where the trucks containing goods for the brewers whose premises are so connected are separated from the trucks containing goods for the brewers whose premises are not so connected. The former trucks do not enter the goods station at all, but are taken along other sidings near or into the premises of the brewers for whom they are intended. Some brewers have locomotive engines of their own, and in that case the railway company leave the trucks on the railway company's siding communicating with the brewers' premises, and the brewers themselves haul the trucks into their own premises. Other brewers have no locomotive engines, and in that case the railway company haul the trucks into the brewers' premises with their (the railway company's) engines. In the case of outward traffic, the brewers who have locomotive

engines haul the trucks out of their own premises on to the railway sidings, whence they are hauled by the railway company to the sidings outside the goods station, where they are made up into trains for their respective destinations without entering the goods station at all. In the case of brewers who have no locomotive engines the railway company haul the trucks out of the brewers' premises. In both cases the brewers themselves load and unload the goods at their own cost, and if they desire to shift the trucks in their own premises, after they have been hauled in, and before they are ready to be hauled out again, they do so, at their own cost, with locomotive engines, if they have them, or with horses.

6. The railway company are thus saved the cost of loading and unloading the goods, the cost of the necessary station accommodation in the goods station, and, in the case of the brewers who have locomotives, the cost of hauling the trucks into or out of the brewers' premises. The railway companies have always allowed a rebate or deduction from the station-to-station rate in respect of the services thus dispensed with, and in 1866 they agreed that the rebate or deduction allowed to brewers having sidings on their premises should be 9d. per ton. This rebate or deduction, and the grounds on which it was made, were well known at the time to the *plaintiff and the other brewers in Burton, and [257 has continued to be made from 1866 down to the present time.

7. In the case of the defendants, the rebate or deduction of 9d. per ton fairly represents what it would cost them to perform the service of loading and unloading, and for the necessary station accommodation.

8. The defendants have always carried for the plaintiff in the manner and on the terms set out in paragraph 4. The plaintiff has sometimes carted his traffic between his premises and the defendants' goods station, and sometimes the defendants have done such cartage for him. Whenever the defendants have done such cartage for the plaintiff they have always charged him 1s. per ton for such service, and they have never made him any rebate or deduction from the station-to-station rate.

9. Amongst other brewers carrying on business at Burton there are three firms: Messrs. Truman, Hanbury, Buxton & Co., Messrs. Ind, Coope & Co., and Messrs. Cooper & Co. The brewery and premises of Messrs. Truman, Hanbury, Buxton & Co. have been, during all the period to which this

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action relates, connected with the goods station of the Midland Railway Company by sidings.

10. Messrs. Ind, Coope & Co. have three sets of premises in Burton, which have been, during all the period to which this action relates, connected with the goods station and main line of the Midland Railway Company by sidings.

11. Messrs. Cooper & Co.'s premises, since the year 1872, have been connected with the goods station and main line of the Midland Railway Company by sidings.

12. The Midland Railway Company have, as to Messrs. Truman, Hanbury, Buxton & Co., and Messrs. Ind, Coope & Co., during all the period to which this action relates, and as to Messrs. Coope & Co. since the year 1872, carried goods to and from their respective premises in the manner and on the terms set out in paragraphs 5 and 6 of this case. Messrs. Ind, Coope & Co. have locomotive engines at their premises on the south of the Midland Company's main line, but not at their premises on the north. The other two firms have no locomotive engines.

13. The defendants have running powers over the main line of the Midland Railway Company and the sidings south 258] thereof, and *by this means have access by railway to the premises of Messrs. Ind, Coope & Co. on the south of the main line of the Midland Railway Company. The defendants have no running powers over the sidings on the north of the main line leading to the premises of Messrs. Ind, Coope & Co., and Messrs. Truman, Hanbury, Buxton & Co., and have not access by railway to the last-mentioned premises. The defendants have running powers over the line and sidings leading to Messrs. Cooper & Co.'s premises, but only on the terms contained in s. 53 of the Midland Railway Company's Additional Powers Act, 1867, which make it more costly to use such powers than to cart through the streets, and such powers have in fact never been exercised.

14. The defendants and the Midland Railway Company equally profess to carry to all towns in England, Scotland, or Wales, and to most of these towns they have equal facilities of access. Where the access is substantially quicker by one railway than the other the brewers are practically compelled by their customers to make use of the railway giving the quicker access. There are towns to which the plaintiff and all or some of the three firms send goods, and there are towns to which the plaintiff sends goods, but to which the three firms do not.

15. The three firms in question can practically send the whole of their outward traffic by either railway, because

they either send chiefly to towns to which the access is equally convenient by either railway, or to customers who are "tied," that is, who are under an obligation to purchase beer of a particular brewer. The plaintiff's trade is substantially an open trade. The inward traffic of the three firms, consisting mainly of barley, hops, and empty barrels, is not under their control to the same extent, but it amounts to only about one-eighth of their total traffic.

16. The defendants, having access by railway to the premises of Messrs Ind, Coope & Co., situated on the south side of the main line of the Midland Railway Company, have, since the year 1866 and during all the period to which this action relates, carried for Messrs. Ind, Coope & Co., from and to the last-mentioned premises on the terms set out in paragraphs 5 and 6.

17. The defendants have, as to Messrs. Truman, Hanbury, Buxton & Co.'s premises, and as to Messrs. Ind, Coope & Co.'s *premises, north of the said main line, during [259 all the period to which this action relates, and as to Messrs. Cooper & Co.'s premises since the year 1872, carried to and from such premises in the manner described in paragraph 4; but although they have carted all the goods they have so carried, they have done such cartage gratuitously, and have not charged the said firms 1s. per ton, or any sum whatever, for such cartage; and the defendants have also allowed to the said three firms the rebate or deduction of 9d. per ton on all the goods they have so carried, although they have in fact loaded and unloaded such goods for the three firms, and have afforded, in respect of such goods, the ordinary accommodation of their goods station.

18. If the defendants had not so carted gratuitously, and had not made such rebate or allowance of 9d. per ton, Messrs. Truman, Hanbury, Buxton & Co. and Messrs. Cooper & Co. would have diverted to and sent by the Midland Railway Company substantially the whole of their outward traffic, and all three firms would have diverted to and sent by the Midland Railway Company such of their inward traffic as they could influence.

19. The defendants so carted gratuitously, and so made such rebates and allowances to the three firms, with the view of securing a share of the traffic of the three firms, which was considerable and yielded a profit after allowing the 9d. per ton and doing the carting gratuitously, and to prevent its being, so far as the three firms could do so, diverted and sent by the Midland Railway Company, and not with the intention of prejudicing the plaintiff; but the hav-

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ing such gratuitous cartage done, and such rebate or allowance made by the defendants, is an advantage to the three firms. If the defendants had not so carted gratuitously, and had not made such rebate or allowance as aforesaid, the plaintiff would have gained no positive advantage, inasmuch as his traffic would not have been carried at a cheaper rate, but the three firms would have lost the advantage of being able to have their traffic carried by either railway on the same terms, and the defendants would have lost substantially the whole of their outward traffic and a portion of their inward traffic.

20. From the year 1863 down to March, 1874, the plaintiff and some other brewers in Burton employed a man named 260] Ball as *their traffic manager to settle and adjust their freightage accounts with the three railway companies, and to conduct their correspondence with the railway companies relating to the traffic. Ball was aware that the defendants were carrying for the three firms on the terms mentioned in paragraph 17, but for reasons of his own, and contrary to his duty to his employers, he concealed such knowledge from them, and the plaintiff, although he heard some rumors in the spring of 1874, did not get reliable information of what the defendants were doing until August or September, 1874.

21. On the 7th of January, 1875, the plaintiff and other brewers wrote to the defendants complaining of the free cartage so done, and the rebate and allowance so made by them to Messrs. Truman, Hanbury, Buxton & Co., and Messrs. Cooper & Co., and asking for the repayment of the various amounts which they had overpaid to the defendants, and on the 30th of January following they made an application to the Railway Commissioners under the Regulation of Railways Act, 1873, in which they complained that the defendants carried for Messrs. Truman, Hanbury, Buxton & Co. and Messrs. Cooper & Co. as stated in paragraph 17, and asked for an order that the defendants should desist from such practice, which they alleged to be an undue preference.

22. On the 10th of March, 1875, the Railway Commissioners granted the injunction applied for.

23. In pursuance of the injunction so granted, the defendants ceased, on the 31st of March, 1875, to cart gratuitously for and to make the rebate or allowance to the three firms as stated in paragraph 17, and the consequence is that they have lost substantially the whole of the outward traffic of Messrs. Truman, Hanbury, Buxton & Co. and Messrs. Cooper & Co., and some small part of the inward traffic of the whole of the three firms.

24. The question for the court is, whether the plaintiff is entitled to recover the whole or any part of the sum of 1s. 9d. per ton upon goods carried by the defendants for him under the circumstances described, and upon which he has paid cartage during the six years before the commencement of this suit ⁽¹⁾.

The court is to have power to draw inferences of fact.

*Jan. 19. *A. Wills*, Q.C. (*Gould* with him), for the [261 plaintiff: The facts stated show that the defendants have contravened the provisions of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2⁽²⁾, for the plaintiff does not enjoy the

⁽¹⁾ The writ of summons was issued on the 13th of April, 1875.

⁽²⁾ By the Railways Clauses Consolidation Act, 1845 (8 & 9 Viet. c. 20), s. 3, "The following words and expressions . . . shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction . . . the word 'toll' shall include any rate or charge or other payment payable under the special act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway."

Sect. 90: "And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit: Provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or ad-

vance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular company or person travelling upon or using the railway."

Sect. 97: "If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriage or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the moneys arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto; or it shall be lawful for the company to recover any such tolls by action at law."

By 9 & 10 Vict. c. cciv, s. 2, the Railways Clauses Consolidation Act, 1845, is made to apply thereto; and by s. 3 the defendants were constituted a body corporate.

By the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2: "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable pref-

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262] same advantages with *respect to traffic upon their line as are granted by them to the three firms whose premises are connected with the Midland Railway by sidings; he is therefore entitled to recover in the present suit the difference between the amounts actually paid to the defendants and the amounts which he would have had to pay if he had been charged at the same rate as the three firms.

[LUSH, J.: What is the authority for saying that an action will lie to recover alleged overcharges by a railway company in contravention of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2? A remedy by injunction under the latter statute may be obtained in some instances when no redress is allowed by action: *Barker v. Midland Ry. Co.* ('); *In re Marriott* (').]

Great Western Ry. Co. v. Sutton (') shows conclusively that an action will lie in the present case.

[MELLOR, J.: *Lancashire and Yorkshire Ry. Co. v. Gidlow* (') is an authority to the like effect.]

Possibly at common law the defendants would not be bound to carry the plaintiff's goods at the same rates as those of the three firms, for though the hire charged by a carrier must be reasonable, it need not be uniform, Cliffton on Contracts, 10th ed., chap. 3, sect. 2, p. 441; but the statutes already mentioned clearly impose the duty of treating upon equal terms all persons dealing with the defendants, and they are not justified in charging a higher rate to the plaintiff on the ground that large sums have been expended in connecting by sidings the premises of the three firms with the line of the Midland Railway Company, and that if the defendants did not make the allowance complained of, the traffic of the firms would be diverted to that company: *Harris v. Cockermouth and Workington Ry. Co.* ('). It has
263] been decided that a railway company cannot *charge a customer for a service which he does not require to be performed, *Garton v. Great Western Ry. Co.* ('); *Garton v. Bristol and Exeter Ry. Co.* ('); and upon a similar principle the defendants were not entitled to charge the plaintiff for services which they performed gratuitously for other

erence or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

(') 18 C. B., 46; 25 L. J. (C.P.), 184.

(²) 1 C. B. (N.S.), 499; 26 L. J. (C.P.), 154.

(³) Law Rep., 4 H. L., 226.

(⁴) Law Rep., 7 H. L., 517.

(⁵) 3 C. B. (N.S.), 693; 27 L. J. (C.P.), 162.

(⁶) 5 C. B. (N.S.), 669; 28 L. J. (C.P.), 150.

(⁷) 6 C. B. (N.S.), 639; 28 L. J. (C.P.), 306.

customers. Then the plaintiff is not bound by the conduct of Ball, who was acting dishonestly towards him.

[PER CURIAM: The defendants were guilty of no fraud, and the plaintiff is bound by the settlement of accounts made whilst Ball was in his service.]

At all events, the plaintiff is entitled to recover for the period which elapsed between the end of Ball's service and the commencement of this action.

J. W. Mellor, Q.C. (*J. S. Dugdale* with him), for the defendants: The plaintiff cannot recover any part of the alleged overcharges; for his agent, though he may have acted fraudulently towards his employer, was of course aware of the terms upon which the defendants dealt with the three firms; as the plaintiff was at one time legally, though not actually, affected with notice, it must be taken that he had notice of the gratuitous cartage and of the rebate at the time when he settled accounts with the defendants after the service of Ball had terminated.

[MELLOR, J.: That argument is not sustainable; it is a convenient doctrine that the knowledge of the agent is the knowledge of the principal; but it is not of unlimited application.]

Before any redress can be obtained under 17 & 18 Vict. c. 31, s. 2, there must be an intention on the part of the company to favor particular persons, per *Kindersley*, V.C., in *Attorney-General v. Great Northern Ry. Co.* (¹). Here it is expressly found that the company only desired to protect themselves, and therefore the statute is inapplicable.

[LUSH, J.: The remarks of the Vice-Chancellor must be read with reference to the facts before him; he intended to point out that, as the defendants in that case were inflicting a public and *not merely a private wrong, they were [264 liable to be restrained by an injunction issuing out of the Court of Chancery.]

In order to succeed, the plaintiff ought to show that he has sustained damage; an injury personal to himself must be the foundation of his claim; and upon the facts stated, no wrong has been inflicted upon him. The real sufferers by the allowances made by the defendants to the three firms are the Midland Railway Company. Large sums have, no doubt, been expended in connecting the respective premises of the three firms with the line of the Midland Railway Company; and they are now reaping the benefit of the capital which has been invested in constructing the sidings. A railway company may, for an adequate consideration, agree

(¹) 1 Dr. & Sm., 154, at p. 163; 29 L. J. (Ch.), 794, at p. 801.

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to carry at a lower rate, provided that their motive in so doing is only to increase their traffic and thereby to benefit themselves: *Nicholson v. Great Western Ry. Co.* (¹), and this is all that the defendants have done: they have shown no "undue," that is, unreasonable preference, for if they had not dealt with the three firms upon the terms complained of, almost the whole of the traffic would, as it appears from paragraph 23, have passed to the Midland Railway Company, who have been the real gainers by the proceedings before the Railway Commissioners. Further, although the interpretation given to the word "tolls" in s. 3 of the Railways Clauses Consolidation Act, 1845, is somewhat extended, it must be in s. 90 understood in its ordinary signification, that is to say, as meaning the consideration for allowing goods to be carried over the company's line in the carriages of their owners; this has been decided to be the sense of the word in s. 97, *Wallis v. London and South Western Ry. Co.* (²); s. 90 is therefore inapplicable to the present case.

A. Wills, Q.C., replied.

Cur. adv. vult.

Feb. 2. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

MELLOR, J.: We are of opinion that the gratuitous cart-
265] age and *the allowance of rebate granted by the defendants to the three brewing firms mentioned in the case, but not granted to the plaintiff, although made *bona fide* for the simple purpose of attracting their traffic to the defendants' line of railway, in lieu of its being sent by competing lines, and although such traffic realized a profit to the defendants notwithstanding such an allowance or rebate, did, under the circumstances, amount to an undue preference or advantage given to them by the defendants' company, and is contrary to the language and meaning of the equality clause, 8 & 9 Vict. c. 20, s. 90, and also of 17 & 18 Vict. c. 31, s. 2; and we think, therefore, that the plaintiff is entitled to recover the overcharges made to him by the defendants, which must be measured by the value of the services gratuitously rendered to the three firms, viz., Messrs. Truman, Hanbury & Co., Messrs. Ind, Coope & Co., and Messrs. Cooper & Co., as described in paragraphs 17 and 18 of the special case.

Prima facie, the conduct of the defendants, in charging the plaintiff who carried on a like business with the three brewing firms last mentioned, 1s. per ton for cartage, and

(¹) 5 C. B. (N.S.), 366; 28 L. J. (C.P.), 89.

(²) Law Rep., 5 Ex., 62.

making no allowance to him as a rebate on the rate of carriage of his goods, amounts to an undue preference to the three firms in question, and constitutes a violation of the equality clauses, which regulate charges allowed to be made by railway companies to persons sending traffic of the like kind on the same line and by the same description of train, and unless some answer is to be found in the special circumstances of the present case, we cannot doubt that it is within the mischief intended to be provided for by the provisions of the several acts above referred to. No doubt, dicta and decisions are to be found to the effect that the legitimate interests of competition with rival lines are not to be lost sight of, and that if the traffic of one firm is less costly to the carrying company than that of another, owing to special circumstances, so that an equivalent merely is given for the difference in cost, a sum may be deducted *bona fide* in the one case which is not allowed in another, if the company making the difference have only the interest of the proprietors in view, and the legitimate increase of the profits of the railway. Again, when that firm to whom an allowance is made undertakes *to send regular and complete [266 loads, producing a certain adequate increase of economy and profits to the company, that may be a sufficient consideration for a differential charge: *Nicholson v. Great Western Ry. Co.* (').

In the present case the ground for the difference in charge between the three firms and the plaintiff, is based upon the fact that the three firms are connected with other lines running into the same districts by sidings and connections, which have been made at great expense by these firms, and which enable them to send their traffic by the other lines at as low a rate as the defendants charge them after making the deduction and rebate of 1s. 9d., and that it is therefore within the line of legitimate and fair competition to endeavor to obtain the traffic of the three firms by equalizing in this way the cost of conveyance. It is stated that the differential rate charge to the plaintiff as against the three firms is nevertheless remunerative to the defendants, and is done *bona fide* for the sole purpose of attracting traffic from the other lines with which the three firms are so connected; and that after all the goods of the three firms find their way to their destination by the defendants' line at the same cost to the senders as they would if sent by the rival lines; and the contention is, in the present case, that the only interests

(') 5 C. B. (N.S.), 366; 28 L. J. (C.P.), 89.

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which are prejudicially affected by this mode of dealing are the interests of the rival lines of railway.

It is argued that, by this mode of dealing, the defendants only allow to the three firms an adequate compensation for the advantageous position which they have acquired, by the expense of constructing the connections and sidings which they have been able to make with the rival lines; and it appears that the effect of the defendants being restrained from continuing these deductions and allowances to the three firms has been to cause them to send their traffic by the rival lines, and that the plaintiff derives no advantage from the change, as he has still to pay the same rate as before, and the three firms availing themselves of their special advantage get their goods carried at a rate equivalent to that paid by them before.

We are unable to give effect to this reasoning. The simple fact *remains that the defendants did make a differential rate between the plaintiff and the three firms for the very same services, and that by such a course of charge the plaintiff paid 1s. 9d. per ton more for getting his goods to the same market by the same or similar trains, and carried under the same circumstances of risk and cost to the defendants, and that it is not the less an undue and preferential charge as between the plaintiff and the defendants, because the three firms were possessed of the advantage of a connection with rival lines, which enabled them to send their goods by those lines at an equivalent rate of charge. We therefore agree with the judgment of the Railway Commissioners and the reasoning upon which it is founded, as reported under the name of *Thompson and others v. London and North Western Ry. Co.* ⁽¹⁾. We think that a railway company cannot merely for the sake of increasing their traffic reduce their rates in favor of individual customers, unless, at all events, there is a sufficient consideration for such reduction, which shall lessen the cost to the company of the conveyance of their traffic, or some other equivalent or other services are rendered to them by such individuals in relation to such traffic. It is not easy to distinguish the consideration suggested in the present case from that suggested in *Harris and others v. Cockermouth and Workington Ry. Co.* ⁽²⁾; the only difference being that in the present case the circumstances actually exist which were there threatened.

It is too late to contend that the principle of the equality clause, 8 Vict. c. 20, s. 90, only applies to tolls for the use

⁽¹⁾ 2 Nev. & Mac., 115.

⁽²⁾ 3 C. B. (N.S.), 693; 27 L. J. (C.P.), 162.

on the railway of carriages not belonging to the railway, and the decision to which Mr. Mellor referred, of *Wallis v. London and South Western Ry. Co.* (¹), was not upon this question, but upon the 97th section of 8 Vict. c. 20, and turned upon other considerations. It must, we think, be considered as settled that the 90th section of 8 Vict. c. 20, as well as the provisions of 17 & 18 Vict. c. 31, and 36 & 37 Vict. c. 48, apply to traffic generally, and are not limited to tolls strictly so called.

The only remaining question made before us is whether, under *the circumstances, the action for money had [268 and received would lie against the defendants to recover back the overcharges made by the defendants to the plaintiff, and from what time; that the action will lie is settled by the highest authority: *Great Western Ry. Co. v. Sutton* (²).

During the argument by Mr. Wills, we intimated our opinion that the payments made for carriage and freightage, as adjusted and settled by Ball in the manner described in paragraph 20, bound the plaintiff, and that none of those payments could be recovered back. But we are of opinion that from the time when Ball last settled accounts up to September, 1874, when the plaintiff acquired knowledge of the inequality, he is entitled to recover back the overcharges as having been paid in ignorance of the facts; and from the 7th of January, 1875, down to the date of the writ, as having been paid under compulsion. We have entertained some doubt as to the period between September, 1874, and the 7th of January, 1875; but as nothing is said of any protest or complaint until January, we are of opinion that the payments made during that period must be considered as voluntary payments, and cannot therefore be recovered back. Our judgment will consequently be for the amounts of payments made during the periods mentioned, to be ascertained by the arbitrator, and for such costs as may be agreed upon, or as he shall settle and determine.

Judgment accordingly.

Solicitors for plaintiff: *Dobinson, Geare & Son.*

Solicitor for defendants: *R. F. Roberts.*

(¹) Law Rep., 5 Ex., 62.

(²) Law Rep., 4 H. L., 226, at pp. 262, 263.

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[2 Queen's Bench Division, 271.]

April 25, 1877.

271] *WRIGHT V. THE LONDON GENERAL OMNIBUS COMPANY.

Res judicata—Award of Compensation by Magistrate for Damages caused by furious driving, a bar to further Proceedings—6 & 7 Vict. c. 86, s. 28.

An award of compensation by a magistrate against the driver of a hackney or metropolitan stage carriage upon an information for furious driving, under 6 & 7 Vict. c. 86, s. 28, is a bar to a subsequent action against such driver's employers by the party injured in respect of his injuries.

If the party injured accepts such compensation he is barred from further proceedings, even where he did not lay the information or, in the first instance, request the magistrate to award compensation.

THIS was an action of tort remitted to the county court for trial under 30 & 31 Vict. c. 142.

The plaintiff, a cabman, sued for damages in respect of injuries occasioned by the furious and negligent driving of an omnibus driver in the defendants' employ. The facts, as appearing from the county court judge's notes, were as follows: It appeared that the driver had been racing with another omnibus driver, and had come into collision with the plaintiff's cab, causing the damage complained of. The police took out a summons against both the drivers, for furious driving, under 6 & 7 Vict. c. 86, s. 28. On the hearing before the magistrate, he convicted both the drivers and fined each of them £3. He then asked the plaintiff, who appeared as a witness, whether £10 would be sufficient compensation for the damage he had sustained. The plaintiff said that it would not, but the magistrate nevertheless awarded him the sum of £5 against each of the drivers by way 272] of compensation under the provisions of *the above-mentioned act, and these amounts were paid into court by the drivers respectively, and received by the plaintiff. The company set up as a defence to the action that the award of compensation by the magistrate was a bar to any further recovery of compensation by the plaintiff. The plaintiff's counsel offered to allow a deduction in respect of the compensation awarded from any sum which the jury might assess as damages. The county court judge refused to give effect to the defence and left the case to the jury, who found for the plaintiff. The verdict was thereupon entered for the plaintiff for £95. The defendants appealed against this decision, and a rule *nisi* had been obtained to set aside the

verdict and enter a nonsuit or for a new trial on the ground of misdirection⁽¹⁾.

Francis showed cause: The award of compensation by the magistrate against the driver is not a bar to further proceedings against the company. There is nothing in the statute to show that the compensation so awarded is intended to be in full of all compensation. When it is intended that the summary proceedings shall be a bar to proceedings by way of action, as in the statutes that have from time to time provided for summary proceedings in the case of assaults, the Legislature has used express words to that effect. The jurisdiction of the magistrate only goes up to £10, and when he awards compensation there is a satisfaction of any damages *pro tanto*, but if, as here, the amount he can award is wholly inadequate, there is nothing unreasonable in the plaintiff's being at liberty to proceed further. Again, [273 assuming that if the plaintiff were a party to the proceedings before the magistrate he would have been barred, the plaintiff here was not a party complaining before the magistrate. The information was laid by the police, and the plaintiff, on appearing as a witness, did not ask the magistrate to award compensation, but, on the contrary, stated that £10 would not be sufficient. The mere fact of his afterwards receiving the amount awarded is immaterial. He did not receive it in full of the compensation to which he was entitled, but only on account of it. It cannot, therefore, be taken that he assented to the magistrate's finally determining the amount of compensation. He therefore neither set the jurisdiction of the magistrate in motion, nor did he subsequently assent to its exercise.

[He cited *Lee v. Lancashire and Yorkshire Ry. Co.*⁽²⁾.]

A. Cock, in support of the rule, was stopped by the court.

COCKBURN, C.J.: I am of opinion that this action is not maintainable. The question turns wholly on the construc-

(1) 6 & 7 Vict. c. 86, s. 28: "Every driver of a hackney carriage or driver or conductor of a metropolitan stage carriage who shall be guilty of wanton or furious driving, or who by carelessness or wilful misbehavior shall cause any hurt or damage to any person or property being in any street or highway, &c., shall for every such offence forfeit the sum of three pounds. . . . And in every case where any such hurt or damage shall have been caused, the justice, upon the hearing of the complaint, may adjudge as and for compensation to any party aggrieved as aforesaid a

sum not exceeding ten pounds, and may order the proprietor of the hackney carriage or metropolitan stage carriage, &c., forthwith to pay such sum, &c.; and any sum which shall be so paid by the proprietor shall in like manner be recovered in a summary way, before a justice of the peace, from the driver or conductor, &c.; or it shall be lawful for the justice in the first instance to adjudge the amount of such compensation to be paid by such driver or conductor to the party aggrieved."

(2) Law Rep., 6 Ch., 527.

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tion of 6 & 7 Vict. c. 86, s. 28. That section first provides for the infliction of a penalty on the driver misconducting himself, and then goes on to provide that compensation may be awarded by the magistrate to the party aggrieved either against the proprietor of the hackney carriage or metropolitan stage carriage, in which case the proprietor may recover the amount from the driver, or against the driver himself in the first instance. It is true that the amount of compensation which the magistrate can award is limited to £10, and it was no doubt intended that the provisions of the section should only be put in force when the damage done was slight. Here the sum of £10 was not adequate to the damage done, but that circumstance is immaterial when we come to look at the legal effect of what took place on the plaintiff's position. The magistrate here convicted the two drivers, and inflicted a penalty of £3 on each of them. He then went on to award the sum of £5 as compensation to be paid by each of the drivers to the plaintiff. I think that such award of compensation is binding on the plaintiff, and prevents this action from being maintainable. Assuming at present that [274] the plaintiff was a party complaining *before the magistrate, and asking for the exercise of this jurisdiction, it was admitted that if the award of compensation by the magistrate had been against the company itself, the plaintiff could not have proceeded further. Having appealed to the special jurisdiction given under the act he must abide the result, and could not obtain a further award of compensation against the company by another tribunal. It is also clear that if the plaintiff had asked for and obtained compensation against the company he could not proceed to claim further compensation against the driver. The party damaged cannot obtain compensation both against the master and against the servant. Either the master can be rendered liable or the servant, but not first one and then the other. So when the magistrate awards compensation against one, the party aggrieved cannot afterwards proceed against the other. It seems to us that when the jurisdiction given by the section is exercised and compensation is awarded, the award is in full of the compensation recoverable by the party damaged, and he cannot recover anything more. The argument most relied on for the plaintiff was that he was not a complaining party, and that the compensation was awarded to him contrary to his wishes, and, consequently, the award does not bind him. It is true that the plaintiff did not originally ask for the exercise of the jurisdiction given by the section, but in the course of an inquiry upon

a complaint made by other parties, the magistrate expresses his intention of awarding compensation, and asks if £10 will be sufficient. The plaintiff answers that it will not; but, nevertheless, when the magistrate proceeds to award this amount to him, he takes it. It seems to me that by taking the £10 he consented to the exercise of the jurisdiction, and was bound by it. Suppose on a complaint by the police against a driver for furious driving, the magistrate having inflicted a penalty, and not proposing to make any further order, the party damaged had stood forward and asked for compensation, surely he would be bound by the award of compensation as much as if he had laid the information. This case is not quite the same, but it comes within the same principle. By taking the money the plaintiff must be taken to have acquiesced in the magistrate's determining the question of compensation, though the award was insufficient to compensate him. The fact that he was *ignorant of the legal effect of his acting as he did [275 can make no difference. He cannot claim further compensation after consenting to the exercise of the magistrate's jurisdiction by accepting the compensation awarded to him. I think it is a pity, under the circumstances, that the magistrate did not inform the plaintiff what the effect of allowing him to award compensation would be, for I am afraid that the plaintiff was misled, and thought that he was not prejudicing his right to recover further compensation against the company. I hope that this case may operate as a warning to magistrates in other cases to prevent such a misconception, but the plaintiff's ignorance of the law cannot enter into consideration in determining the legal result of his consenting to the award of compensation. The rule must be made absolute to enter a nonsuit.

MELLOR, J.: I am of the same opinion. The provisions of the 28th section of 6 & 7 Vict. c. 86, with regard to awarding compensation to the party aggrieved, are not confined to cases where the complaint is made by such party. The words of the section are very wide. The complaint against the driver for furious driving may be made by the police or any other person, but, "in every case," whether such complaint is by the party aggrieved or not, the magistrate may, where hurt or damage is caused to any person or property, "adjudge as and for compensation to the party aggrieved, as aforesaid, a sum not exceeding £10." I do not think it possibly could be intended that the compensation in such a case should be recovered piecemeal, partly before the magistrate and partly elsewhere. The meaning appears to me to

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be that where the party considers that the compensation may be covered by an amount not exceeding £10, in that case the magistrate shall determine the amount of compensation. The provision appears to me to be a very advantageous one with regard to the cases it was intended to meet, though in the present case the plaintiff seems to have availed himself of it in ignorance of the legal effect of what he was doing. It is intended to give to the party aggrieved a speedy and convenient mode of recovering in respect of slight injuries by means of the summary jurisdiction of the magistrate, so that when the complaint is brought before [276] the *magistrate with regard to the driver's misconduct, the whole matter may be settled, and the party injured may recover his compensation without being sent to the county court or compelled to engage in further litigation. It appears to me that there is no reservation of any further right of compensation, and that if the party aggrieved avails himself of the summary remedy given by the section he cannot afterwards proceed elsewhere. The plaintiff in the present case submitted himself to the magistrate's jurisdiction, in my opinion, by accepting the amount of compensation awarded. The matter thus became *res judicata*, and cannot be reopened.

Rule absolute.

Solicitors for plaintiff: *Weed & White.*

Solicitors for defendants: *Stevens, Wilkinson & Harrison.*

See 3 Eng. Rep., 390 note; 17 Eng. Rep., 246 note; 17 Eng. Rep., 184 note; 19 Eng. Rep., 647 note.

In *New Brunswick* the recovery of a judgment against one wrongdoer, without satisfaction, is a bar to an action against the others for the same cause: *Lawton v. Adams*, 5 Allen, N. B., 274.

An action was brought against three persons as joint tortfeasors. Pending the suit, the plaintiffs executed to L., one of the defendants, a release under seal, in which it was declared that it was not to prejudice or impair the plaintiffs' claim against the other two defendants. The release was executed in consideration of \$500, and in terms released and discharged L. from all claims of every description for damages accruing or accrued by reason of the wrongs complained of; the plaintiffs thereby acknowledging themselves "to be fully paid and satisfied for all and singular the trespasses complained

of" by them in the suit then pending against the three defendants jointly. Held, 1. That the release enured to the benefit of all the defendants, and was a bar to the action. 2. That the proviso, in the release, by which the right to recover, for the same injury, against the other defendants was attempted to be reserved to the plaintiffs was simply void, being repugnant to the legal effect and operation of the release itself: *Gunther v. Lee*, 45 Maryland, 60; *Ruble v. Turner*, 2 Hen. & Munf. (Va.), 38.

The judgment plaintiff in an action against joint defendants may enforce his judgment against either of them at his option.

Where a judgment was obtained against a town and another for injuries caused by the negligence of the co-defendant, the plaintiff is not compelled to resort to the property of the latter

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for satisfaction of the judgment : doer, such waiver does not operate as
 Palmer v. Stacy, 44 Iowa, 340. an election so to do in favor of another :

Though the party injured elect to Cohn v. Goldman, 43 N. Y. Superior
 waive the tort as against one wrong- Ct. R., 436.

[2 Queen's Bench Division, 276.]

April 18, 1877.

WHITELEY and Wife v. PEPPER.*Negligence—Master and Servant—Coal Grate in Highway.*

The carman of the defendant, a coal merchant, for the purpose of delivering coals at the premises of a customer, removed an iron plate in the footway which covered an opening communicating with the coal cellar. The plaintiff was passing along the footway at the time. The carman gave her no warning that the plate was taken up, and in consequence of his negligence in not taking due precautions, without any want of due care on her part, she fell into the opening and sustained injuries :

Held, in an action against the defendant for negligence, that he was responsible.

Pickard v. Smith (10 C. B. (N.S.), 470) considered.

APPEAL from the decision of the county court.

The facts were as follows: The action was in respect of injuries received by the female plaintiff, in consequence of the negligence of the defendant's servant in leaving a coal grate in the footpath open.

The defendant was a coal dealer. He had an office at a railway station at which orders for coals were received, and coals were sent out by him from the station in pursuance of the orders so received.

The whole duty of the men employed by the defendant to deliver coals to customers consisted in delivering such coals.

*On the 26th of January, 1876, a carman of the de- [277
 fendant, named Hopper, was delivering coals at the house of a customer named Walton.

In order to deliver the coals it was necessary to raise an iron plate in the pavement. The plate was fastened by a chain from the inside, and there was a hook at the end of the chain going into a staple in the interior of the house. Under the iron plate was an inclined plane by means of which the coals were shot into the cellar. The chain was unhooked by some person in Walton's employ, and Hopper then raised the iron plate, opened the shoot, and went to the tail of his cart, which was standing parallel to the pavement with the horse's head towards the direction from which the female plaintiff was coming. He removed the tail board and placed it against the wheel nearest the pavement, and then went to the tail of his cart. Two women then came along the pavement, and he called out to them, "Mind, the grate is up." The female plaintiff followed be-

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hind the two other women, but not near enough to hear the warning given to them, and Hopper gave her no warning, and without any want of due care on her part she fell into the coal shoot, and sprained her ankle and sustained other damage.

It was submitted that there was no evidence of negligence on the part of the defendant, and that the defendant was not liable on the authority of the *dictum* of Williams, J., in *Pickard v. Smith* ⁽¹⁾.

The judge refused to nonsuit, and ruled that every one who interfered with a public highway so as to render it dangerous to passengers was bound to guard against such danger, and that the servant of the defendant having in the course of his employment neglected this duty the defendant was liable.

The judge found a verdict for the plaintiff for £21 damages. The question for the court was whether he was right in so doing.

Cave, Q.C., for the defendant: In the case of *Pickard v. Smith* ⁽¹⁾ Williams, J., expressed an opinion that the coal merchant under similar circumstances would not be liable. It was held in that case that the occupier of the premises was liable.

278] **[FIELD, J.: The dictum was merely thrown out in the course of the argument. There is nothing in the judgment of the learned judge that helps the defendant.]*

The coal merchant's contract is only to deliver the coals. The occupier is bound to see that any arrangement on his premises for taking delivery is not dangerous to the public. The defendant's servant has no authority to deal with the coal grate except by the occupier's consent, and so far as he deals with it he is the occupier's servant, and not the defendant's. It is not the coal dealer's interest that the coals should be delivered in one way more than in another. It is for the benefit of the customer that they are delivered in that or any other particular way which entails increased risk to the public.

Horne Payne, for the plaintiff, was not called upon.

MELLOR, J.: I am of opinion that the county court judge was right, and that his decision must be sustained. The defendant's counsel contends that all responsibility connected with the delivery of coals in the way here adopted lies upon the customers only. I cannot agree with that contention. It may be that in this case an action would lie against the occupier of the premises, but it is clear to my

⁽¹⁾ 10 C. B. (N.S.), 470.

mind that an action lies against the defendant for the negligence of his servant. It is the common case of negligence by a servant in the scope of his employment for which the master is responsible. The *dictum* of Williams, J., is no doubt entitled to very great respect, but it is to be observed that the judgment in the case of *Pickard v. Smith* ⁽¹⁾ merely decides that the occupier was responsible; we do not say that there was not abundant justification for that decision, and there is no expression in the judgment itself which at all conflicts with our decision.

FIELD, J.: I am of the same opinion. It is not necessary to say whether in this case the occupier of the premises would be liable. The only question is, whether the judge was right in holding that the defendant was liable. The coal grate was in a highway, over which the public had a right to pass, and the defendant by his servant raised the plate which protected passengers from the opening into the cellar. Into this opening the *plaintiff, without any [279 negligence on her part, fell. There was nothing unlawful in removing the plate if the carman had taken due precaution to protect the public from accidents, but it is found that there was a want of care on his part. It seems to me clear on these facts that the case falls within the ordinary principles upon which a master is rendered liable for the negligence of his servant. The only difficulty is that created by the supposed *dictum* of Williams, J., in *Pickard v. Smith* ⁽¹⁾. But there is really nothing in the judgment in that case, or the reasoning on which it is founded, which conflicts with our present decision.

Decision affirmed.

Solicitors for plaintiffs: *Ridsdale, Craddock & Ridsdale*, for Crumlin.

Solicitors for defendant: *Whittakers & Woolbert*, for Paley.

⁽¹⁾ 10 C. B. (N.S.), 470.

In this country it is not only clear that the coal merchant would be liable under the circumstances of the principal case, but the owner of the real estate would not be, if the coal merchant, by his servant, had the exclusive possession so far as was necessary to enable him to deliver the coal: *Clapp v. Kemp*, 122 Mass., 481.

The owner of real estate is not liable for the negligence of a contractor with whom he has contracted to do a *legal* and *proper* act which, if *properly done*,

would not result in injury to another: 17 Eng. Rep., 380 note; *Id.*, 300; *McClafferty v. Spuyten Duyvil*, etc., 61 N. Y., 178; *Sweet v. Gloversville*, 12 Hun, 302; *Ryder v. Thomas*, 13 Hun, 296; *Wood v. School District*, 44 Iowa, 27; *Joliet v. Harwood*, 1 Chicago Law Jour., 249; *Schweickhardt v. St. Louis*, 2 Missouri App. Rep., 571. 579-580; *Milligan v. Wedge*, *Arnold & Hodges*, Q. B., 73, 12 Ad. & Ellis, 737, 4 Perry & Dav., 714; *Earl v. Beadleston*, 42 N. Y. Superior Court R.,

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294; *Lawrence v. Lux*, 39 Conn., 586; *Erie v. Caulkins*, 85 Penn. St. R., 247.

Provided he bind the contractor to use proper means to protect the property of the adjoining owner: *Sulzbacher v. Dickie*, 6 Daly, 469.

The rule is otherwise where the contract directly requires the performance of work intrinsically dangerous, however skilfully performed. In such case the party authorizing the work is regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract. In such case the right of recovery does not rest upon a charge of negligence on the part of the contractor, but upon the fact that the person making the contract with such contractor caused work to be done which was intrinsically dangerous, the natural consequence of which was the injury to plaintiff's property: *Joliet v. Harwood*, 1 Chicago Law Jour., 249; *Sulzbacher v. Dickie*, 6 Daly, 469; *Rose v. Philadelphia*, 2 Leg. Chron. Rep., 165; *Earl v. Beadleston*, 42 N. Y. Superior Court Rep., 294.

Digging up the street of a city has been so held: *Nashville v. Brown*, 9 Heisk. (Tenn.), 1.

So if the owner interferes with the contractor and subjects him to his command he is liable: *Rohrman v. Reese*, 2 Leg. Chron. Rep., 110; *Rose v. Philadelphia*, Id., 165; *Rourke v. White Moss*, etc., *post*, p.

Where the landlord of a building undertakes a repair thereof it has been held he is bound to see that the tenants thereof are properly protected, and cannot, by contract, shift the responsibility upon a contractor to the injury of the tenants: *Sulzbacher v. Dickie*, 6 Daly, 469.

To the contrary: *Lawrence v. Lux*, 39 Conn., 586.

An owner of real estate has no right to a support of his soil from that of an adjoining owner, beyond what would be necessary to support it in its natural condition without improvements, such as fences, shrubbery, etc.: *Gilmore v. Driscoll*, 122 Mass., 199, 23 Am. Rep., 312, 16 Eng. Rep., 382 note.

Missouri: *Busby v. Holthaus*, 46 Mo., 161.

New Jersey: *Thomas, etc., v. Allentown, etc.*, 28 N. J. Eq., 77, and cases cited in note.

By the common law the owner of land in making an excavation on his own premises is bound to use reasonable care, and is liable for consequent injuries to his neighbor's property resulting from his negligence, but he is not bound to shore up his neighbor's house, nor give him notice of his intention to excavate: *Dorrity v. Rapp*, 4 Abb. N. C., 292, Court Appeals.

Missouri: Not liable unless guilty of negligence; if so, is: *Charless v. Rankin*, 22 Missouri, 566; *Busby v. Holthaus*, 46 Missouri, 161.

New Jersey: *Thomas, etc., v. Allentown, etc.*, 28 N. J. Eq., 77, and cases cited in note.

New York: *Dorrity v. Rapp*, 4 Abb. N. C., 292.

By statute in New York, in the cities of *New York and Brooklyn*, a new protection is given to the owners of lands against injuries from excavations on adjoining lands more than ten feet below the curb of the street. But in order to avail himself of such protection, he must grant to the owner making the excavation, if requested by him, permission to enter upon his premises to support his wall.

Unless the owner excavating asks for such permission of the adjoining owner the failure of the latter to grant it will not free the former from liability. That the excavation was made by a contractor does not free the owner from liability: *Dorrity v. Rapp*, 4 Abb. N. C., 292, Court Appeals, reversing 11 Hun, 374.

See *Earl v. Beadleston*, 42 N. Y. Superior Court Rep., 294.

In an action for damages on account of an excavation, where a want of care and skill is charged and denied, it must be proved. Negligence cannot be inferred from the facts of the excavation and injury, where the injury might have happened without the excavation: *Ward v. Andrews*, 3 Missouri App. Rep., 275.

A party wall, the central line of which throughout is coincident with the line of division of the respective premises, is not an incumbrance: *Hendricks v. Stark*, 37 N. Y., 106; *Mohr v. Parmelee*, 43 N. Y. Superior Court Rep., 320.

Otherwise as to a lot whereon stands an entire party wall subject to appropriation and use as such, whether arising from grant or prescription: *Giles*

v. Dugro, 1 Duer, 331; *Mohr v. Parmelee*, 43 N. Y. Superior Court Rep., 320.

If one start a wall as a party wall partly on his own land and partly on that of his neighbor, he must build it as a party wall as high as he erects, and cannot build it a portion of the way *solely* on his own land. He must carry it up all the way as a party wall so as to give the adjoining owner all the benefits of a party wall: *Milne's Appeal*, 81 Penn. St. R., 54; *Vallmer's Appeal*, 61 Penn. St. R., 118.

One of the tenants in common of a party wall has no right to do an act affecting the same so as to weaken the wall perpendicularly: *Earl v. Beadleston*, 42 N. Y. Superior Court Rep., 294.

One of two tenants in common of a ruinous wall may take it down with the intention of rebuilding it as it originally stood, but he cannot take it down and rebuild it without rebuilding it of such a height as not to restore the roof of his co-tenant, adjoining, to the same height: *Jones v. Read*, Irish L. R., 10 C. L., 315.

See *Earl v. Beadleston*, 42 N. Y. Superior Court Rep., 294; *Reynolds v. Fargo*, 1 Buff. Superior Court Rep., 531.

The general rule is, that either of the adjacent owners in a party wall may increase its height when it can be done without injury to the adjoining building, and the wall is of sufficient strength to bear the addition. The injury to

the adjoining building, which would prohibit the additions is physical—to the building itself—it does not embrace remote consequences, not the necessary result of the addition to the wall: *Musgrove v. Sherwood*, 54 How. Prac., 338.

Where a party wall or portico belongs to adjoining owners, each has a right to conform his portion of such party wall or portico to his building, but he has no right to so conform any greater portion thereof: *Nash v. Kemp*, 12 Hun, 592.

See also *Fox v. Clark*, 10 Eng. Rep., 178; *Vrooman v. Jackson*, 6 Hun, 326.

Where a wall was built as a party wall, for a fence, with a right to either party to raise it at his own expense, this does not give him a right to raise for the purpose of using it as the wall of a *building*: *Hutchinson v. Mains, Alcock & Napier* (Irish), 155.

As to liability of one who uses a party wall under agreement as to compensation to be paid party erecting, if does so, and as to whether such agreement binds a purchaser of the land: see *Warner v. Rogers*, 23 Minn., 34; *Eckleman v. Miller*, 57 Ind., 88.

As to the right of support by requiring one to whom minerals are granted to leave proper pillars for support of the soil above: *Randolph v. Halden*, 44 Iowa, 327; *Thomas, etc., v. Allentown, etc.*, 28 N. J. Eq., 77, and cases cited in note; *Sloan v. Lawrence*, 29 Ohio St. R., 568.

[2 Queen's Bench Division, 279.]

May 2, 1877.

VENABLES V. SMITH.

Hackney Carriage—Cab Proprietor and Driver, relation between—Master and Servant—Bailor and Bailee—Negligence—Scope of Employment.

The plaintiff was run over and sustained injuries through furious driving on the part of a cab driver, and brought his action for such injuries against the proprietor of the cab. The arrangement between the proprietor and the driver was that the horse and cab were intrusted by the former to the latter for the day, to be used entirely at the driver's discretion during the day, for the purpose of plying for hire. The driver was to pay 16s. for the cab; all that he made above that sum was his perquisite for his labor, and any deficiency he had to make good afterwards. There was no particular time fixed for going out or returning with the cab. On the day when the accident occurred, the driver was on his way back with the cab to the stables of the proprietor intending to return the cab. When he came to the end of the mews in which the stables were, he went on with the cab to a tobacconist's a little way off and purchased some snuff, and on his way back to the stables the accident happened:

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Held, that the proprietor was liable for the acts of the driver while acting within the scope of the purposes for which the cab was intrusted to him, as a master for the acts of his servant, and that the driver was at the time of the accident so acting.

Powles v. Hider (6 E. & B., 207 ; 25 L. J. (Q.B.), 331) followed.

ACTION against a cab proprietor for injuries occasioned to the plaintiff by furious driving on the part of a cab driver 280] in *defendant's employ. The action had been remitted to the Marylebone county court for trial under s. 10 of the County Courts Act, 1867. It was agreed that the case should go to the jury with regard to the question of damages, but that the following two questions should be decided as matters of law by the county court judge, viz., whether the relation of master and servant existed between the defendant and the cab driver ; and whether, if so, the cab driver, at the time when he caused the injuries complained of, was acting within the scope of his employment. As to these two points the county court judge stated the facts as follows :

The cab driver hired the cab, with the use of two horses, from the defendant, at 16s. a day. He had no specified time of starting from or returning to the stables ; but he started early in the morning to get back early at night. The cab had no name on it, but there was the defendant's number on it granted to him for the cab. Whatever the driver got over 16s. was his perquisite for his labor, and any deficiency was his own loss to be made good afterwards. On the day on which the accident happened, the driver had set down his last fare at South Bank, St. John's Wood, at about 9 p.m., and was on his way home to the stables, having finished for the day. He went down Gloucester Place, across Portman Square (the stables being in Great York Mews, Baker Street), into Portman Street. At the end of Portman Street there is a tobacconist's shop. He had reached the top of York Mews, at the Gloucester Place end, when he thought he would get some snuff at the tobacconist's. The distance to the shop was about a quarter of a mile ; no distance, the driver said, for the horse, but more for him to go when he was tired. He went to get the snuff, and having done so proceeded to the stables, and whilst on his way there, the plaintiff was run over. The driver was drunk at the time, and driving furiously. The county court judge decided in favor of the plaintiff on both points, and the verdict was accordingly entered for £20, the damages found by the jury.

Against this decision the defendant appealed.

A rule *nisi* had been obtained to set aside the verdict, and to enter a nonsuit, or for a new trial, on the ground that the

relation between the defendant and the cab driver was not that of master *and servant, but that of bailor and [281] bailee, and that the driver was not acting within the scope of his employment when he caused the injuries complained of.

Russell Griffiths showed cause: The case of *Powles v. Hider* ⁽¹⁾ is an authority directly in favor of the plaintiff. See also *Morley v. Dunscombe* ⁽²⁾. The ground of those decisions is that the statutes relating to hackney carriages impose upon the cab proprietor in respect of the acts of the cab driver the liability of a master for the acts of his servant. The provisions of 6 & 7 Vict. c. 86, ss. 10, 24, 27, and 28, show that the Legislature intended the cab proprietor to be liable for the acts of the cab driver. *Fowler v. Lock* ⁽³⁾ has not shaken the authority of *Powles v. Hider* ⁽¹⁾. In the court below the judgment was wholly concerned with the question of the relation of the proprietor and driver *inter se*, which is a different question from that of their relation *quoad* the public, and in the Court of Exchequer Chamber no decision was given on the point of law.

With regard to the second point it is submitted that the driver was, when the accident happened, still occupied in the course of his employment. He was on his way home to the stables, though he went a somewhat roundabout way for the purpose of procuring snuff. But it was left entirely to his discretion where he should go with the cab in the course of his day's work.

[He cited 32 & 33 Vict. c. 115, s. 6; *Laugher v. Pointer* ⁽⁴⁾; *Quarman v. Burnett* ⁽⁵⁾; *Fenton v. City of Dublin Steam Packet Co.* ⁽⁶⁾; *Story on Agency* ⁽⁷⁾; *Whatman v. Pearson* ⁽⁸⁾; *Story v. Ashton* ⁽⁹⁾; *Mitchell v. Crassweller* ⁽¹⁰⁾; *Burns v. Poulson* ⁽¹¹⁾.]

Willis, Q.C., *Pike*, and *Pain*, supported the rule: The cab driver was engaged in an independent journey wholly foreign to the employment. He was intrusted with the cab to ply for hire. *His day's work was done, and he [282] had come to the entrance to the mews when he thought that he would go on farther to get some snuff. This formed no part of the purpose for which as between himself and the proprietor the cab was trusted to him. *Story v. Ashton* ⁽⁹⁾ is in point in defendant's favor.

⁽¹⁾ 6 E. & B., 207; 25 L. J. (Q.B.31.), 3

⁽²⁾ 11 L. T., 199.

⁽³⁾ Law Rep., 7 C. P. 272; 9 C. P., 751.

⁽⁴⁾ 5 B. & C., 547.

⁽⁵⁾ 6 M. & W., 499.

⁽⁶⁾ 8 A. & E., 835.

⁽⁷⁾ Page 407.

⁽⁸⁾ Law Rep., 3 C. P., 422.

⁽⁹⁾ Law Rep., 4 Q. B., 476.

⁽¹⁰⁾ 13 C. B., 237; 22 L. J. (C.P.), 100.

⁽¹¹⁾ Law Rep., 8 C. P., 563.

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[COCKBURN, C.J.: That class of cases is distinguishable. There the servant has certain specific orders as to the mode of dealing with the cart or whatever is the subject of his employment. If under those circumstances he employs it on some purpose wholly independent of his orders the master is not responsible. But here the cab is intrusted to the man generally. Suppose he goes out of his way to get some refreshment.]

Refreshment in the course of his day's work would stand on a different footing. Here the day's work was done.

[COCKBURN, C.J.: The driver might have revoked his determination not to take another fare.]

Secondly, the relation was not that of master and servant, but bailor and bailee. *Powles v. Hider* (') was the case of loss of a passenger's luggage, and a question of contract arose between the cab proprietor and the hirer. If the Hackney Carriage Acts create the relation of master and servant, that relation must be limited to the purposes of those enactments.

COCKBURN, C.J.: The first question that arises is, whether the relation of master and servant existed between the defendant and the cab driver, so as to render the defendant responsible for the damage caused by the driver. I agree that, independently of the acts of Parliament relating to this subject, the relation between them would be that of bailor and bailee, not that of master and servant. The cab proprietor hands over the horse and cab to the charge of the driver, to be used by him for the purpose of plying for hire at his own discretion and not subject to the proprietor's control. So far I agree with the reasoning of the majority of the court in the case of *Fowler v. Lock* ('). But I think that the provisions of the acts of Parliament alter what 283] would otherwise be *the relation of the proprietor and the driver, and for the protection of the public produce the result that, as regards mischief done by the driver, who is selected by the proprietor, the relation of master and servant so far exists as to render the proprietor responsible for the acts of the driver. But then it is contended that the liability of the master only exists with respect to acts done by the driver within the scope of his employment, and that the driver here was not acting within the scope of his employment. To determine whether the driver was so acting or not it is necessary to consider what the terms were upon which the cab was intrusted to the driver. If the employment of the cab by the driver at the time when the mischief

(') 6 E. & B., 207; 25 L. J. (Q.B.), 331.

(?) Law Rep., 7 C. P., 272.

was done was wrongful, in the sense that it was beyond the scope of the bailment, then the master would not be responsible; because it is with regard to the employment of the cab within the scope of such bailment that the relation of master and servant is created by the statutes for the protection of the public. But it appears that the cab was intrusted to the driver to use entirely at his discretion, provided that he used it properly and returned it to the proprietor's stables when the day's work was over, paying the sum agreed upon between them for the hire of it. I cannot see that the driver did anything wrongful, or contrary to the terms of the bailment as between himself and the proprietor, in using the vehicle for the purpose of going to the tobacconist to get snuff. For these reasons I think the decision of the county court judge was right, and that the rule must be discharged.

MELLOR, J.: I am of the same opinion. With regard to the first question, viz., whether the relation between the cab proprietor and the driver is that of master and servant, I am disposed to rest my judgment upon the decision in the case of *Powles v. Hider* ⁽¹⁾, which seems to me in point. With regard to the question whether the driver was acting within the scope of his employment, it seems to me that by the terms of the arrangement between the proprietor and the driver the fullest discretion was vested in the latter as to how he should earn money. He was to return the cab when he had done with it, but he was not bound to return at any particular moment, or to take any particular [284 route. We must look at the matter from a reasonable point of view. If the driver were to take the cab on an independent journey, altogether out of the scope of the purposes for which it was intrusted to him, no doubt the proprietor could not be rendered responsible for acts done by him in the course of such journey, but I do not think the driver was in this case going on any such independent journey so as to relieve the master. It seems to me, therefore, that the decision should be affirmed.

Rule discharged.

Solicitor for plaintiff: *Berkeley*.

Solicitor for defendant: *Pain*.

⁽¹⁾ 6 E. & B., 207; 25 L. J. (Q.B.), 331.

See 3 Eng. Rep., 313 note; 4 Eng. Rep., 302 note; 9 Eng. Rep., 223-5 note; 17 Eng. Rep., 300 note; 17 Eng. Rep., 380 note; note to *Whiteley v. Pepper*, ante, p. 343.

The general rule may be stated to be that the master is liable for the acts

or the negligence of his servant or agent while legitimately engaged about or within the scope of his employment.

In the following cases it was held he was so engaged: see 6 Cent. L. J., 251; Id., 412; *McKinley v. Chicago*, etc., 44 Iowa, 314, 24 Am. Rep., 748; *Bass*

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v. Chicago, etc., 42 Wisc., 654, 24 Am. Rep., 437; S. C. on first appeal, 39 Wisc., 636; Nashville, etc., v. Starnes, 9 Heisk. (Tenn.), 52, 24 Am. Rep., 296, 299 note; Craker v. Chicago, etc., 36 Wisc., 657; Milwaukee, etc., v. Finney, 10 Wisc., 389; Pierce v. O'Keefe, 11 Wisc., 180; Eckert v. St. Louis, etc., 2 Missouri App. Rep., 36, 45-6, and cases cited; Pendleton v. Kinsley, 3 Cliff., 416, 423-429. In the following not: See 6 Cent. L. J., 251; Id., 412.

[2 Queen's Bench Division, 290.]

April, 18, 1877.

[IN THE COURT OF APPEAL.]

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*HUDSON V. TABOR (¹).*Sea wall, Liability of Frontagers to repair—Prescription.*

The plaintiff was the occupier of land and the defendant the owner of adjoining land, both fronting to a creek communicating with the sea. It was necessary for the protection of his land that each person having land fronting the creek should maintain a sea wall to keep out the high tides, and such sea wall had been maintained along the creek time out of mind. The plaintiff's wall was continuous with the defendant's, and the level of the defendant's land was higher than that of the plaintiff's. It became necessary from time to time to put fresh materials on the top of the walls to keep them up to the proper height; the defendant had neglected so to top his wall, and owing to an extraordinary high tide, the water flowed over his wall, and so from the defendant's land on to the plaintiff's land, doing considerable damage:

Held, affirming the judgment of the Queen's Bench Division, first, that the mere fact that each frontager had always maintained the wall in front of his land, and that no one had thought it necessary to erect a wall to protect his land from the water which might come from his neighbor's land, was no sufficient evidence to establish a prescriptive liability on the part of the defendant to maintain the wall for the protection of the adjoining landowners:

Secondly, that by the common law, apart from prescription, no such liability was cast on the defendant, as a frontager.

APPEAL by the plaintiff from a judgment of the Queen's Bench Division in favor of the defendant (²).

The facts are fully set out in the report in the court below, and are sufficiently stated in the judgment of the Court of Appeal and in the head-note.

291] *1876. Nov. 7, 8. *Thesiger*, Q.C., and *F. M. White*, for the plaintiff.

Philbrick, Q.C., and *H. C. Bennett* (with them *Day*, Q.C.), for the defendant.

The arguments and cases cited were the same as in the court below.

In addition were cited for the plaintiff, the judgment of Lord Romily, M.R., in *Morland v. Cook* (³), *Barber v.*

(¹) Affirming 16 Eng. Rep., 290.

(²) 1 Q. B. D., 225; 16 Eng. Rep., 290.

(³) Law Rep., 6 Eq., at p. 267.

Whiteley ('), and *Earl of Devonshire v. Gibbons* ('); statutes 23 Hen. 8, c. 5, and 3 & 4 Wm. 4, c. 22, ss. 15, 46.

For the defendant: Chitty on Prerogative, p. 173; Hale de Jur. Mar. Harg. Tr., p. 8.

LORD COLERIDGE, C.J., referred to passages in the judgments in *Rex v. Commissioners of Pagham Level* (').

Cur. adv. vult.

1877. April 18. The judgment of the Court (Lord Coleridge, C.J., Mellish, Brett, and Amphlet, L.JJ.) was delivered by

LORD COLERIDGE, C.J.: In this case the plaintiff was the occupier and the defendant the owner of lands in Essex adjoining each other, and fronting a tidal estuary. Along the front of these lands, and for a long way on either side of them, a sea wall has been maintained, time out of mind, to keep back the sea water from overflowing the lands inside the wall; which lands but for the wall would at each high tide have been overflowed. The wall from various causes gets lower from time to time; and it has been usual for each frontager, according as necessity dictates, to raise, or, as it is called, to "top" his wall, in order to keep out the tide. There was an unusually high tide on the 20th of March, 1874. The defendant had neglected to top his wall, and in consequence of his neglect the sea flowed over his wall and did much damage to the plaintiff's lands which were contiguous, as well as to the defendant's own. The action was brought to recover compensation for this damage, and the question is whether there was any obligation on the defendant as between him and the plaintiff to *maintain [292 this wall. The court below thought that there was not; and we are of that opinion.

In this case, in the absence of any evidence oral or documentary, beyond the fact that each frontager had been accustomed to repair and top the sea wall in front of his own land, it was possible to suggest two modes only by which the alleged obligation to repair for the benefit of the plaintiff could be imposed upon the defendant,—prescription and common law. By prescription, no doubt, it might be imposed, if there were any evidence of the prescription. *Keighley's Case* ('), and the language of Lord Tenterden in *Rex v. Commissioners of Sewers for Essex* ('), are distinct authorities for this proposition. But prescription is matter of evidence, and one of the questions in this case is whether

(¹) 34 L. J. (Q.B.), 212.

(²) Hard., 169.

(³) 8 B. & C., 355.

(⁴) 10 Co. Rep., 139 a.

(⁵) 1 B. & C., 477.

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Hudson v. Tabor.

there was any evidence to establish the prescription. The only evidence was that the defendant and his predecessors had been used to repair that portion of the wall which defended his land from the sea, that the other frontagers along the wall had done the same thing, and that no one had ever, by side fences or otherwise, protected his land from the possible damage which would arise if his neighbor neglected to keep his special portion of the sea wall in repair. But this, which is the whole, is not enough. The mere repair of a man's own fence for his own benefit, however often done, and during however long a period of time, will not *per se*, although a man's neighbor may in fact benefit by such repair, impose on a man the duty of continuing such repair for his neighbor's benefit, when he ceases to care to do it for his own. In this case the non-construction by the respective frontagers of any side defences is not, as the court below has pointed out, any further evidence of the liability which it is sought to impose. Each frontager had a direct interest in keeping up his frontage wall to protect his own land, and each frontager may well have relied upon the practical protection afforded him by the manifest self interest of his neighbors all along the line to protect themselves.

It is not to be denied that expressions are attributed to Lord Tenterden in *Rex v. Commissioners of Sewers for Essex* (1) from *which it might be argued that he thought that mere usage to repair, without more, would impose the liability to repair for the benefit of others. But the evidence in the case, which was on affidavit, is very shortly stated, and it was not one between individual frontagers, but between a frontager and the commissioners of sewers, who had inflicted upon him the whole expense of repairing his own wall, by his default in repairing which great damage to a whole level had been occasioned. Nor, inasmuch as the affidavits were held to establish the prescriptive liability of the frontager in point of fact, does the case really in any manner conflict with our decision in the case before us.

Next, in the absence of any evidence of presumption, is there such a liability as is contended for imposed upon a frontager at common law? It would lead to manifest hardships if it could be. "Suppose the case," says Mr. Scarlett, *arguendo*, in *Rex v. Commissioners of Sewers for Essex* (2), "of 1,000 acres of land all preserved by the same wall; the owners of 500 acres may have only five yards of

(1) 1 B. & C., 477.

(2) 1 B. & C., at p. 482.

wall, whilst the owner of a much smaller portion may have 1,000 yards; that may be washed down, the whole of his estate may be destroyed, and yet he may be compelled to repair the wall for the benefit of others." It must be admitted that such a consequence might not improbably follow, but there is no sufficient authority to warrant us in saying that in point of law it does follow.

We entirely assent to the criticism of the court below upon the cases from the Year Book, 18 Edw. 3, f. 23, and the Liber Assozirum, 37 Edw. 3, pl. 10, and in 8 Hen. 7, f. 5, and upon the passage in Callis (p. 115), where these authorities are cited⁽¹⁾. The learning, as to the right and duty of the Crown to protect the realm from waste of the sea before the time of Henry VI, and since his time to exercise this prerogative by means of commissioners of sewers, seems to us to point in the same direction. It is said that it was the duty of the king to guard and protect the shores and lands adjoining the sea from being overflowed by the sea; but although expressions are used, as, for example, by Lord Wynford in *Henly v. Mayor of Lyme*⁽²⁾, from which it might *seem that this was supposed to be a liability [294 to be enforced against the king, such cannot be the meaning of them, and no mode of enforcing it has been, or can be, suggested. But the king has probably from the very earliest times had a right, as part of the prerogative, to defend the realm against waste of the sea, and to order the construction of defences at the expense generally of those who are to be benefited by them. The various statutes of sewers, beginning with the statute of 6 Hen. 6, c. 5, do but regulate the exercise of the prerogative in this respect, and prescribe the forms of commissions for the ordering and execution of the necessary works, which forms have from time to time been varied. In early times probably the king ordered the construction of such sea walls as he judged necessary, very much according to his own discretion. In process of time, however, this discretion came to be limited by established rules, and at last by statute; but prior to any statute, it is laid down by Fitzherbert, De Nat. Brev. 225 E, and assented to by Lord Coke in the case of *The Isle of Ely*⁽³⁾, that before the king granted his license to repair a trench coming from the sea, or make a new one, there should be a writ of *ad quod damnum*, "to inquire what damage it will be to the king or others;" and without a proper return to such a writ, such works, as we under-

⁽¹⁾ See 1 Q. B. D., at pp. 231-3.

⁽²⁾ 5 Bing., at p. 109.

⁽³⁾ 10 Co. Rep., at p. 143 a.

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stand Lord Coke, could not be done. The writ of *ad quod damnum*, though probably a common law writ, is not, as stated by Reeve, vol. ii, p. 230, to be found mentioned before the time of Edward I; and is most commonly to be found employed in reference to the king's license to *aliene in mortmain*; but it appears to have been very early applied to other subjects, and amongst them to the making of rivers and the making and repair of defences against the sea. And the whole of this procedure is entirely inconsistent with the notion that at common law the frontager could be compelled by action to repair any part of such defences which had been injured "by the outrageousness of the sea." The same observation applies, and with increased force, to the whole machinery which the successive statutes of sewers have provided since the time of Henry VI.

As to the origin of the sea wall in this case, in point of fact, general history and county history are alike silent. 295] But in all *likelihood it was first erected either by the king at the expense of those to be benefited by it, assessed upon them respectively in proportion to the benefit they did or would respectively receive, or by some great landowner for his own benefit, whose land, if it came into the hands of separate owners, would be liable to no other burdens than those which the law imposes upon all other land within the realm. But, as we have said, we can see no reason for holding that the burden sought to be imposed upon the defendant in this case in respect of his frontage land is one of such burdens, and we are of opinion that the judgment in his favor given by the court below should be affirmed.

Judgment affirmed.

Solicitor for plaintiff: *J. Hudson.*

Solicitors for defendant: *Beaumont & Warren.*

See 16 Eng. R., 298 note; 19 Eng. R., '6 note; 19 Eng. R., 840 note.

[2 Queen's Bench Division, 295.]

April 11, 1877.

[IN THE COURT OF APPEAL.]

ROBINSON V. PRICE and Others (').

- *Ship and Shipping—General Average—Imminent Risk—Auxiliary Steam Pumping Power—Spars and Cargo burnt as Fuel.*

A ship sailed well equipped and manned for the voyage, having a donkey engine on board and a reasonable supply of coals to work it for pumping purposes. The ship met with very heavy weather and sprang a leak, and in order to keep her

(¹) Affirming 19 Eng. Rep., 232.

afloat, it became necessary to use the engine for pumping, and the coals running short, the captain burnt with the coals the ship's spare spars and some of her cargo :

Held, that the sacrifice of the spars and cargo was general average.

APPEAL by the defendants from the decision of the Queen's Bench Division, 19 Eng. Rep., 232.

French, for the defendants, contended that the additional statement of the arbitrator (at the bottom of p. 95) ought not to have been made without taking fresh evidence, citing *Nickalls v. Warren* ⁽¹⁾.

[LORD COLERIDGE, C.J.: This is nothing more than what is constantly done; if the arbitrator happens to be present, the court *asks for an explanation of a statement [296 which does not appear sufficiently explicit.]

He then contended that the additional statement was inconsistent with par. 6, and that the facts did not show any such imminent peril as to make the burning of the spars and cargo general average. The shipowners were bound to have sufficient coals on board to work the donkey engine. He referred to *Harrison v. Bank of Australasia* ⁽²⁾.

G. Bruce, for the plaintiff, was not heard.

LORD COLERIDGE, C.J.: In my opinion the judgment of the Queen's Bench Division was perfectly right. The facts are now stated so distinctly as to preclude all argument. It is impossible to say that under the circumstances this sacrifice of the spars and cargo was not general average.

BRAMWELL and BRETT, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiffs: *H. C. Cook*, for Tinley, Adamson & Adamson, North Shields.

Solicitors for defendant: *Argles & Rawlins*.

⁽¹⁾ 6 Q. B., 615.

⁽²⁾ Law Rep., 7 Ex., 39.

[2 Queen's Bench Division, 296.]

Dec. 2, 1876.

[CROWN CASE RESERVED.]

THE QUEEN V. LANGTON.

Evidence—Refreshing Memory—Entries checked by Witness at the Time—Joint Stock Company—Evidence of its existence.

The prisoner was a timekeeper, and T. C. was pay clerk, in the employment of a colliery company. It was the duty of the prisoner every fortnight to give a list of the days worked by the workmen to a clerk who entered the days and the wages due in respect of them in a time book. At pay time it was the duty of the prisoner to read out from the time book the number of days worked by each workman to T. C., who paid the wages accordingly. And T. C. saw the entries in *the time [297

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book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences:

Held, that T. C. might refresh his memory, by referring to the entries in the time book, in order to prove the sums paid by him to workmen.

The prisoner being charged with obtaining by false pretences the moneys of a company:

Held, that the existence of the company was sufficiently proved by evidence that it had carried on business as such.

CASE reserved by the chairman of the Kirkdale quarter sessions.

The prisoner, Edward Langton, was tried on the 11th of July last, upon an indictment charging him, in the first and second counts, with obtaining by false pretences from Thomas Chitson certain money of the Tawd Vale Colliery Company, Limited, with intent to defraud, and in the third count, with obtaining by false pretences from Samuel Higginbottom certain other money of the said company with intent to defraud.

The prisoner was in the service of the said company as one of their timekeepers. It was his duty to give in to another clerk, fortnightly, a list of the number of the days on which the workmen in the employ of the company had worked during the preceding fortnight. It was the duty of the clerk to enter in the time book these numbers and the amount of the wages due to each workman according to the number of days worked, and from this time book, at the time of paying the workmen's wages, it was the prisoner's duty to read out aloud the number of the days each man had worked, and the wages were then paid to the workman by the pay clerk accordingly. Robert Aspinwall, a workman in the employ of the company, kept a provision shop on his own account, at which the prisoner dealt, and at the time when the prisoner made the false pretences charged in the indictment, he was indebted to the said Robert Aspinwall. The 14th of April last was the day on which the wages earned during the fortnight preceding the 11th of April became payable. During that fortnight Aspinwall had worked twelve days, and no more, and there was due to him in respect of his said work the sum of £2 11s. and no more, his wages, namely, 4s. 3d. a day. At some time between the said 11th and 14th of April, the prisoner asked Aspinwall how many days he had worked during that fortnight. 298] Aspinwall told *him, as the fact was, that he had worked twelve days. The prisoner then asked Aspinwall how much money he, the prisoner, owed Aspinwall in respect of provisions bought of him by the prisoner, and on Aspinwall telling him the amount, the prisoner said, "I will

put it down to your time." There was no evidence of the time list handed in by the prisoner in respect of that fortnight, but the time book was made up, apparently according to the same course, and in the time book the number of fifteen days and a half was entered as the time which Aspinwall had worked during that fortnight, and the sum of £3 5s. 10d., being at the rate of 4s. 3d. per day, for fifteen days and a half day, was entered as the amount of the wages due to him. These entries the prisoner read out aloud at the pay time on the said 14th of April, and the pay clerk, the said Thomas Chitson, then handed to Aspinwall, in the presence of the prisoner, the sum of £3 5s. 10d. accordingly.

The 12th day of the following month of May was the day on which the wages earned during the fortnight preceding the 9th of May became payable. During that fortnight, Aspinwall had worked twelve days, and no more, and there was due to him in respect of such work, at the same rate of 4s. 3d. a day, the sum of £2 11s., and no more. On the said 9th of May, the prisoner asked Aspinwall what time he had worked during that fortnight, and how much he, the prisoner, owed Aspinwall. Aspinwall then told the prisoner, as the facts were, that he, Aspinwall, had worked twelve days, and that the prisoner owed Aspinwall the sum of 18s. 6d., which he had paid for the prisoner at his request. The prisoner then said that he would put the said sum of 18s. 6d. to Aspinwall's time. At the pay time on the said 12th of May the number of days' work entered in the time book to the credit of Aspinwall was sixteen days and a half day, and the sum of £3 10s. 1d. was entered as the amount due to him in respect of such work. These entries the prisoner read out aloud at the said pay time, and the said pay clerk then handed to Aspinwall the sum of £3 10s. 1d. accordingly.

The 9th day of the following month of June was the day on which the wages earned during the fortnight preceding the 6th of June became payable. During that fortnight Aspinwall had *worked twelve days, and no more, and [299 there was due to him, in respect of such work, at the same rate of 4s. 3d. a day, the sum of £2 11s., and no more. On the said 6th of June the prisoner asked Aspinwall what time he had worked during that fortnight, and what the prisoner owed Aspinwall for provisions. Aspinwall then told the prisoner, as the facts were, that he, Aspinwall, had worked twelve days, and the amount which the prisoner owed Aspinwall for provisions, upon which the prisoner said to Aspinwall that he, the prisoner, would put down to Aspinwall's time the amount so owing by the prisoner to Aspinwall.

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On the 6th and 9th day of June, Samuel Higginbottom, the secretary of the said company, was acting as and for the pay clerk, and made up the time book for the wages which became payable on the said 9th of June. And to him the prisoner gave in the number of fourteen days and three quarters of a day as the time which Aspinwall had worked during the said fortnight. The time book was then made up by Higginbottom, according to the usual practice, and on the said 9th of June the prisoner at the pay time read out from the said time book fourteen days and three quarters of a day as Aspinwall's time, and £3 2s. 8d. as the sum owing to Aspinwall in respect of such work.

As to all the charges against the prisoner, Aspinwall proved the sums of money he had received on the said pay days, and the number of the days for which he had been so paid wages, but in respect of the charge mentioned in the first and second counts, Thomas Chitson, the pay clerk, was called as a witness before Aspinwall gave his evidence. The prisoner's counsel objected to Chitson being allowed to refer to the time book, to enable him to say for how many days' work and what amounts of money he had paid Aspinwall, on the 14th day of April and 12th day of May. The counsel contended that as Chitson had not made the entries in the time book, he ought not to be allowed to refer to it to refresh his memory; but as Chitson proved that he had seen those entries whilst the prisoner was reading out aloud at the pay time, and that though at the time of the trial he did not remember the particulars of the entries without referring to the book, yet he knew that at the pay time the prisoner read the entries correctly, and that he Chitson had 300] paid the sums which were mentioned in *those entries, the court allowed his evidence to go to the jury reserving the point for the opinion of this court.

As to all the counts the prisoner's counsel contended that it was necessary, in support of the indictment, to prove that the Tawd Vale Colliery Company, Limited, was an incorporated company, that this could not be proved by parol evidence only, and that as there was only the parol evidence of witnesses who swore that the company was incorporated, the court ought to direct an acquittal of the prisoner.

To this the counsel for the prosecution replied that as, by virtue of s. 88 of the statute 24 & 25 Vict. c. 96, the indictment would be sufficient without alleging any ownership of the money, and as the references to the company might have been omitted without vitiating the indictment, the allegations as to the company might therefore be rejected as surplusage.

The court declined to direct an acquittal, and left the evidence to the jury accordingly, but reserved a case on this point also for the opinion of this court.

The jury found the prisoner guilty.

The court sentenced him to twelve months imprisonment with hard labor, subject to the opinion of this court, as to whether the court was right in overruling the objections raised on behalf of the prisoner by his counsel.

No counsel appeared.

COCKBURN, C.J.: With regard to the first point, the propriety of allowing the witness to refresh his memory by means of the time book, I think he was rightly allowed to do so. If the witness had only seen the entries in the absence of the prisoner, the case might be different. There would then be obvious dangers in admitting such a use of the book, which do not exist in the present case. Here the entries were read aloud by the prisoner himself, and seen by the witness at the time of reading, and he made payments in accordance with them.

As to the other point it was enough to show that the company carried on business as such.

LORD COLERIDGE, C.J., CLEASBY, B., POLLOCK, B., and FIELD, J., concurred.

Conviction affirmed.

See 15 Eng. Rep., 370 note; 18 Eng. Rep., 715 note.

A witness cannot corroborate his statements upon the stand by proof of other statements made by him elsewhere, although contained in a letter written about matters affecting the party in the suit against whom he has testified: *Pulsifer v. Crowell*, 63 Maine, 22; *Capen v. Crowell*, 68 Maine, 455; *Godding v. Orcutt*, 44 Verm., 54.

See *Cross v. Bartholomew*, 42 Verm., 206.

An entry in a book of accounts, which is the principal fact upon which a recovery is based, is not admissible as being part of the *res gestæ*: *Sypher v. Savery*, 39 Iowa, 258; *Godding v. Orcutt*, 44 Verm., 54.

A party who had sold and delivered wheat to another at the latter's warehouse, testified that account was kept of the wheat as delivered, by means of slips of paper tacked on the spout of the hopper, and by entries which he made on a page of his memorandum book; that after the delivery of the last

load, the purchaser's warehouse clerk called off the amounts from the slips of paper, and he took them down on the opposite page of his memorandum; and that he and the clerk then compared the two series of entries and found that they agreed, and the clerk receipted for the amount. Held, that such a memorandum could be used in evidence as a contemporaneous record, to the correctness of which both parties assented when made: *Fish v. Adams*, 37 Mich., 598; *Tanner v. Parshall*, 4 Abb. App. Cas., 256, 3 Keyes, 431; *Meyer v. Reichart*, 112 Mass., 108.

See *Cross v. Bartholomew*, 42 Verm., 206.

A party may examine a memorandum of an account made by him to refresh his memory, though made from another memorandum, if he cannot enumerate the items of the account without the aid of the memorandum, though he has a distinct and independent recollection of the items charged: *Bullock v. Hunter*, 44 Md., 416; *Folsom v. Apple*, etc., 41 Wisc., 602.

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The transcript of evidence taken on a former trial is properly admitted in evidence, where the shorthand reporter who reported the trial testifies that he wrote up the testimony; that the transcript of the testimony is correct; that the witnesses were sworn and testified as therein stated: *Brown v. Luehrs*, 79 Ills., 576.

A witness called to prove the testimony of a deceased witness upon a former trial must be able to state the substance of all the latter's evidence: *Fell v. Burlington, etc.*, 43 Iowa, 177.

The case of *Flood v. Mitchell*, referred to 15 Eng. R., 372, is reported 68 N. Y., 507.

Plaintiff, while on the stand as a witness, was questioned as to a date, and replied he could not state it positively, without refreshing his memory by a memorandum he had; after professing to look, he stated that what he had looked at did refresh his memory; being called upon by defendant's counsel to produce the memorandum, plaintiff's counsel objected and the objection was sustained:

Held, that this was error; that the witness was in effect testifying not from recollection, but from something he professed to have in writing; and that defendant had a right to know what the memorandum was on which witness relied, and whether it had any legitimate tendency to bring to mind the fact in controversy. The error committed in declining to require the production of the memorandum thus referred to was not cured by an offer the next day to produce the memorandum; the party was entitled to see it at the time, in order to test the candor and integrity of the witness: *Duncan v. Seeley*, 34 Mich., 369.

Entries by the deceased clerk of a notary of presentment and demand, made in the ordinary and usual way, in a register kept by the notary for that purpose, are competent evidence to prove such presentment and demand: *Gawtry v. Doane*, 51 N. Y., 84.

To same effect, *Poor v. Robinson*, 13 Bush (Ky.), 290.

So by a deceased notary. Entry "mailed" justifies presumption *postage paid*: *National, etc., v. De Groot*, 43 N. Y. Superior Ct. R., 341.

Where the question was whether a school commissioner had issued to a

school teacher a certificate of examination and qualification, as such, and whether an alleged certificate was genuine or a forgery, the school commissioner on being called testified that to the best of his knowledge and belief he did not sign or issue the certificate. He also testified that he kept a book in which he entered the certificates issued by him during the month in which the certificate bore date. The counsel for defendant produced this book, and offered it in evidence to show that it contained no entry of the certificate in question. Upon plaintiff's objection the book was excluded. Held, that its exclusion was error: *Marrow v. Ostrander*, 13 Hun, 219.

The declaration of a physician as to the disease of which a person is suffering, made while treating the patient, is admissible as having been made by the physician, since dead, in the ordinary discharge of his professional duty: *McNair v. National, etc.*, 13 Hun, 144.

Where a paper which ought to be found in a public office cannot be so found, the presumption is that it has been lost or destroyed. If it has been the basis of official action, of a kind usually drawn up in accordance with a statute and usually following a printed form devised therefor, it is to be presumed that the paper was in the usual form and followed the requirements of the statute: *Mandeville v. Reynolds*, 68 N. Y., 430.

Where the defence to a note is the statute of limitations, an indorsement purporting to have been made by the holder before the note was barred by the statute, is admissible as evidence against the other.

Where, however, there are two joint promissors, an indorsement so made is not evidence against either without proof as to which made it: *Clark v. Burn*, 35 Leg. Int., 224, Supr. Ct., Penn.

In *Kentucky* it is held that where the maker denies the payment, evidence of an endorsement of partial payment before the statute attached is not *sufficient* to prove such payment, but the holder must show an *actual* payment, and that the indorsement was *in fact* made before the statute had attached: *Frazer v. Frazer*, 13 Bush (Ky.), 397.

Otherwise if the payment be not denied: *Hopkins v. Stout*, 6 Bush (Ky.), 375.

[2 Queen's Bench Division, 301.]

Feb. 8, 1877.

[CROWN CASE RESERVED.]

*THE QUEEN V. FOSTER (').

[301

False Pretences—Sale of Goods—Commendation—Misstatement of nature of Goods.

On an indictment for obtaining money by false pretences, it was proved that the prisoner, a travelling hawker, represented to the prosecutor's wife that he was a tea dealer from Leicester, and induced her to buy certain packages which he stated to contain good tea, but three-fourths of the contents of which was not tea at all, but a mixture of substances unfit to drink and deleterious to health. The jury found that the prisoner knew the real nature of the contents of the packages, that it was not tea, but a mixture of articles unfit for drink, and that he designedly falsely pretended that it was good tea with intent to defraud; and the prisoner was convicted:

Held, that the conviction was right.

CASE stated by the deputy chairman of the Leicester quarter sessions.

James William Foster was tried on the 2d day of January, 1877, for obtaining money by means of false pretences from Elizabeth Beckworth, the wife of William Bernard Beckworth.

The indictment contained several counts; but as all these, except the first, were withdrawn, it is sufficient to set out that count only. It stated, "That James William Foster, on the 17th day of November, 1876, at the township of Hugglescote, in the county of Leicester, unlawfully, knowingly, and designedly did falsely pretend to one Elizabeth Beckworth that he was a tradesman in the tea trade in Leicester, that he had good tea for sale, and did then and there offer for sale, and did sell to the said Elizabeth Beckworth sixteen paper packages which he, the said James William Foster, did falsely pretend were each and every of them composed of good tea, by means of which said false pretences the said James William Foster did then unlawfully obtain from the said Elizabeth Beckworth £1 16s. in money, the money of William Bernard Beckworth, her husband, with intent to defraud; whereas, in truth and in fact, the said James William Foster was not a tradesman in the tea trade in Leicester; and the said sixteen packages were not each or any of them composed of good tea, but each and every of the *said packages contained a mixture composed of tea, [302 sand, quartz, and magnetic oxide of iron, which said mixture is unfit for food, and injurious to health, as he the said James William Foster well knew at the time when he did falsely pretend as aforesaid."

(') S. C., 13 Cox's Cr. Cas., 398.

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It appeared in evidence as follows: The prisoner is a hawker, residing at West Bromwich, in the county of Stafford. On the 17th day of November, 1876, he called on the wife of the prosecutor, who is a licensed victualler at Hugglescote, in the county of Leicester, and representing himself to be a tea dealer residing at Leicester, offered to the said Elizabeth Beckworth tea for sale which he said was good tea. He had with him sixteen packages, which appeared to be each 1 lb. packages of tea. He produced a sample of tea, which appeared to be good tea, and he then opened one of the packages taking out of it a quantity, and stating to Mrs. Beckworth, "You see it's like that I showed you." Mrs. Beckworth eventually bought the whole quantity for £1 16s., that is at the rate of 2s. 3d. per lb., in the belief that it was good tea as represented by the prisoner. When the prisoner had left, Mrs. Beckworth opened the packages, and found that instead of tea they contained a mixture of sand and other stuff unfit to drink. Mrs. Beckworth communicated with the police, and the mixture was submitted to Dr. Emmerson, the analyst of the county of Leicester, who found that the mixture was composed of tea, sand, quartz, and oxide of iron, and unfit for food or drink. A week after the sale the prisoner called again at the house of the prosecutor, and being remonstrated with, declared that the substance was tea, and what Mrs. Beckworth took for sand was tea-dust. He offered, however, two pounds of good tea to make it up, which the prosecutor refused to receive. The prisoner was arrested on a warrant, and while in custody had an interview with the police constable in his cell, to whom he stated that he knew he had done wrong, and that if he got out of this job he would lead a different life.

At the trial, Dr. Emmerson, the county analyst, was called as a witness. He deposed that the mixture only contained 25 per cent., or one quarter in weight of tea, that the rest was sand, quartz, earth, and oxide of iron, unfit to drink and injurious to health. He also stated on examination that he believed that the adulteration had taken place in China, 303] and that the mixture was known in *the trade as lie tea. On this the learned counsel for the prisoner appealed to the chairman to stop the case; this, however, he declined to do, and the following witness was called for the defence:

Mr. Simmonds stated that he was a wholesale tea dealer at Birmingham, and had sold the packages in question to the prisoner. He also stated that he had purchased the mixture from the bonded warehouses in London, had paid

1s. 2d. per pound for it, and had sold it to the prisoner at 1s. 4d. per pound, and that in his belief the packages, as produced in court, were the same as those made up in his shop and sold to the prisoner. That he should call the mixture tea, though not good tea, and though he should not drink it himself, as he could get better, he was not prepared to hear that it was injurious to health. He also said that he did not think that a hawker of tea, not being a scientific analyst, could have discovered the deleterious ingredients mixed with it, as the county analyst had done.

On this the chairman charged the jury that if the case were one of simple commendation or praise of an article, and an exaggeration of its quality only, it was not a case under which the prisoner could be convicted, and that before they convicted the prisoner they must be satisfied that he knew what the real nature of the packages was; that it was not tea, but a mixture of articles unfit for drink, and that, knowing the nature of the mixture, he designedly falsely pretended to the prosecutor's wife that it was "good tea" with intent to defraud. That the question was between simple exaggeration and misrepresentation of a fact specific to the contract with intention to defraud.

The jury retired to consider their verdict, and found the prisoner guilty, and the chairman sentenced him to six calendar months imprisonment with hard labor.

The question for the court to consider was, whether the chairman was right in his direction to the jury, or whether he should have directed them that there was no offence at law on the case as proved.

Sills, for the prisoner: The statements of the prisoner amounted to mere commendation of his wares as good when they were not *good. The jury were not asked to [304 find, and did not find, whether the article was or was not tea: *Reg. v. Kerrigan* ⁽¹⁾; *Reg. v. Ball* ⁽²⁾; *Reg. v. Roebuck* ⁽³⁾; *Reg. v. Eagleton* ⁽⁴⁾; *Reg. v. Ardley* ⁽⁵⁾; *Reg. v. Leigh* ⁽⁶⁾; *Reg. v. Pratt* ⁽⁷⁾; *Reg. v. Bryan* ⁽⁸⁾.

Jacques, for the prosecution, was not called upon.

KELLY, C.B.: There is no room for doubt upon this case. The prisoner sold as good tea packages containing what was not tea at all, but three-fourths of it a deleterious mixture.

⁽¹⁾ 1 L. & C. Cr. C., 383; 33 L. J. (M.C.), 71.

⁽²⁾ Car. & M., 249.

⁽³⁾ Dears. & B. Cr. C., 515; 25 L. J. (M.C.), 101.

⁽⁴⁾ Dears. Cr. C., 515; 24 L. J. (M.C.), 158.

⁽⁵⁾ Law Rep., 1 C. C., 301.

⁽⁶⁾ 8 Cox's Cr. C., 233.

⁽⁷⁾ 8 Cox's Cr. C., 334.

⁽⁸⁾ Dears. & B. Cr. C., 265; 26 L. J. (M.C.), 84.

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To call tea good when it was not good might be mere commendation, and not the subject of a criminal prosecution. Here the question was properly left to the jury. They were told that they must be satisfied that the prisoner "knew what the real nature of the packages was, that it was not tea, but a mixture of articles unfit for drink, and that, knowing the nature of the mixture, he designedly falsely pretended that it was good tea with intent to defraud." And the evidence amply supported the finding of the jury. The prisoner's guilty knowledge is shown by his statement to the police constable.

MELLOR, DENMAN, and FIELD, JJ., and HUDDLESTON, B., concurred.

Conviction affirmed.

Solicitors for prosecution: *Austen, De Gex & Harding*, for W. N. Reeve, Leicester.

Solicitor for prisoner: *W. Rogers*, for W. H. Powell, Birmingham.

[2 Queen's Bench Division, 305.]

Feb. 10, 1877.

[CROWN CASE RESERVED.]

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*THE QUEEN V. DEANE⁽¹⁾.

False Pretences—Previous Conviction of Felony—Indictment—Penal Servitude—Sentence.

A prisoner convicted of obtaining money by false pretences, after a previous conviction for felony (the previous conviction being charged in the indictment), cannot be sentenced to penal servitude for a less term than seven years.

CASE reserved by the chairman of the Kirkdale quarter sessions.

On the 17th of January, 1877, Mary Jane Patterson Deane pleaded guilty to an indictment charging her with obtaining money by false pretences. She also pleaded guilty to a previous conviction of felony (after another previous conviction of felony) charged in the same indictment. The chairman sentenced her to seven years penal servitude.

By s. 88 of the Act 24 & 25 Vict. c. 96, the misdemeanor of obtaining money by false pretences is punishable by penal servitude for three years.

Sect. 7 of the same act provides for the punishment of larceny after a previous conviction of felony.

Sect. 8 provides for the punishment of larceny after a previous conviction of an indictable misdemeanor.

⁽¹⁾ S. C., 13 Cox's Crim. Cas., 386.

But there is no express provision in the act for the punishment of an indictable misdemeanor after a previous conviction of felony.

Sect. 116 of the same act, however, which contains provisions for the form in which previous convictions are to be charged, is in these words: "In any indictment for any offence punishable under this act after a previous conviction for any felony, misdemeanor, or offence, it shall be sufficient," &c. It is therefore clear that in this section the insertion of a charge of a previous conviction for felony on an indictment for misdemeanor is contemplated. Whether the words are sufficient to make such an insertion legal, is a question for the consideration of the court.

*By 27 & 28 Vict. c. 47, s. 2, it is provided that no [306 sentence of penal servitude shall be for less than five years, and that "where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be seven years."

By 34 & 35 Vict. c. 112, ss. 8 and 9, it is provided that where there has been a previous conviction of a crime, police supervision may be added to the sentence, and reference for the form of charging the previous conviction is made to s. 116 of the act of 24 & 25 Vict. c. 96, above quoted.

Under these last-mentioned sections, therefore, there is express power to charge a previous conviction for felony in an indictment for misdemeanor, but only for the purpose of sentencing to police supervision.

In the case of *Reg. v. Summers*(¹) it was held that a sentence of penal servitude for five years, on a conviction for a misdemeanor, was right, a previous felony, though proved, not having been charged in the indictment. It will be observed, however, that in the case stated it is assumed that, in an indictment for a misdemeanor under the Larceny Act, a previous conviction of felony could be charged. In the case of *Reg. v. Willis*(²) the case of *Reg. v. Summers*(¹) was followed.

The question for the opinion of the court was whether the sentence of seven years penal servitude was right, and if not, what sentence should be substituted.

No counsel appeared.

KELLY, C.B.: The sentence of seven years penal servitude is right, by the express terms of 27 & 28 Vict. c. 47, s. 2. By that section, "where any person shall, on indictment, be

(¹) Law Rep., 1 C. C., 182.

(²) Law Rep., 1 C. C., 383.

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convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be seven years." When, therefore, a prisoner is convicted upon a charge of false pretences, and also of a previous conviction of felony, duly charged in the indictment, 307] *he cannot be sentenced to a less term of penal servitude than seven years.

MELLOR, LUSH, and DENMAN, JJ., and HUDDLESTON, B., concurred.

Conviction affirmed ⁽¹⁾.

⁽¹⁾ See *Reg. v. Garland*, Ir. Rep., 3 C. L., 383; 11 Cox's Cr. C., 224.

[2 Queen's Bench Division, 307.]

Feb. 10, 1877.

[CROWN CASE RESERVED.]

THE QUEEN V. KENNY ⁽¹⁾.

Larceny—Receiving—Husband and Wife—Adultery.

A wife, though she may have committed adultery, cannot steal her husband's goods; and therefore the adulterer, receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods.

Reg. v. Deer (L. & C. Cr. C., 240; 32 L. J. (M.C.), 33) and *Reg. v. Featherstone* (Dears. Cr. C., 369; 23 L. J. (M.C.), 127) explained.

CASE reserved by the recorder of Chester.

William Edward Kenny was tried upon an indictment, which charged him, in the first count, with stealing, on the 26th of August, 1876, certain money to the amount of £143, one purse, one silver watch, one child's cloak, one scarf, one American box, one Prayer Book, two money bags, and other articles of the moneys, goods, and chattels of Edward Gurn; and in the second count, with feloniously receiving, on the day and year aforesaid, the moneys, goods, and chattels aforesaid, well knowing the same to have been feloniously stolen.

The following was the evidence:—

Edward Gurn: I am an innkeeper at Burslem. On the 23d of June, 1876, my wife left my house without my knowledge or consent. The same night I missed 143 sovereigns. The money was in a bag. This bag (produced) is it. There was another bag without money in it. This (produced) is it. This watch (produced) is mine. My wife wore it sometimes. I gave her no permission to take it or any of the 308] things. This Prayer Book (produced) is *mine.

⁽¹⁾ S. C., 13 Cox's Crim. Cas., 397.

These three sheets (produced) I believe to be mine; four were missing after my wife left. This bed-cover, baby's cloak, scarf, and this American box (all produced) are mine. The money I saw safe on the morning of the 23d of June. I was saving it to buy horses in Ireland. Three days after my wife left I saw the prisoner. He came to my house. A week after that he came again, and asked me how much money my wife took. I told him £15 or £20. I told him that, because I wanted some information from him. I accused him of being out car-driving with my wife on the Sunday before. He denied it. The prisoner left the neighborhood shortly after, and I never heard of him or my wife till October, when I went to Ireland with a police officer. I found them together at Belfast. They were in a back room, packing a box. The prisoner was packing it. It was my American box. I saw some of the contents of the box. My Prayer Book was in it and the child's cloak. The bed-cover was in the prisoner's box. I saw the prisoner searched. He was wearing my watch.

Cross-examined: I sometimes wore the watch, so did my wife. I had another. I wore both as I liked. My wife deposited over £100 with a Mr. Jackson at Cheadle eighteen months before. She did not do that when I had a woman named Slierlock in the house. Nothing of the sort took place. My wife was in court at Tunstal. She did not give evidence. The gold was locked up in a drawer. I had the key in my pocket, and she must have got another.

Re-examined: She took the £100 to Jackson against my will. It was my money. I wrote to him for it, and he sent me a check, which I cashed, and this was part of the £143.

John Dodd: I am a sergeant, Staffordshire police. The prisoner was in that force until the 24th of July last stationed at Burslem. He had not much money. His wages were 22s. per week. I heard of him borrowing from his comrades. He was a single man. I went with prosecutor to Belfast in October. We found the prisoner and the prosecutor's wife there together. He was wearing this watch (produced); I found on him, in these two bags (produced), £98 14s. 8d.

Cross-examined: There were four Irish £1 notes in the money. *The bags were in his pockets. All the [309 other things (except the watch) were in the boxes, and in the rooms occupied by the prisoner and Mrs. Gurn.

Re-examined: The prisoner was packing the box in which I found the bed-cover.

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Harriet Upton: (Evidence of inability to travel arising from illness, having been duly given, the deposition of this witness before the magistrates was read as follows:)

I am a single woman, and live at 10 Paradise Row, Chester. I know the prisoner. I recollect him coming to my house early in the month of August last. It would be about one in the morning. Previously to his coming a lady had been lodging in my house about six weeks. She gave me the name of Mrs. Burslem. The photograph now produced is the photograph of the lady. Mrs. Burslem opened the door for the prisoner when he came. They occupied the same bedroom that night, and left at ten o'clock the night following. I see the American box produced. The prisoner assisted in moving the box downstairs and from the house. Since the prisoner and Mrs. Burslem left I have had a letter asking me to visit them. It came from Belfast. There was only one bed in that room.

Edward Gurn, the prosecutor, recalled: The photograph now produced to me is the photograph of my wife.

Upon this evidence the counsel for the prosecution relied on the second count of the indictment, and contended on the authority of the cases of *Reg. v. Deer* ⁽¹⁾, and *Reg. v. Featherstone* ⁽²⁾, that the wife by adultery with the prisoner in August at Chester, "determined her quality of wife," and in then converting her husband's goods to her own use she was guilty of larceny, and that the prisoner consequently could be guilty of receiving.

The prisoner's counsel argued that a wife cannot be guilty of larceny of her husband's goods, and that there is no decided cases to that effect, the case of *Reg. v. Deer* ⁽¹⁾ being open to the inference that the receiving was from some person other than the wife. And he further contended that there was no sufficient distinct possession of the property 310] by the prisoner (at all events in *the city of Chester and within the jurisdiction of this court of quarter sessions) to render the prisoner liable to conviction as a receiver. He cited *Reg. v. Rosenberg* ⁽³⁾ and *Reg. v. Prince* ⁽⁴⁾.

Having regard to the statute 24 & 25 Vict. c. 96, s. 96, which renders a receiver liable to be indicted whenever the principal felon might be indicted, the learned recorder left

⁽¹⁾ L. & C. Cr. C., 240; 32 L. J. (M.C.), 33.

⁽²⁾ Dears. Cr. C., 369; 23 L. J. (M.C.), 127.

⁽³⁾ 1 C. & H., 233.

⁽⁴⁾ 11 Cox's Cr. C., 193.

the case to the jury, adopting the view taken by the counsel for the prosecution.

Under these circumstances the jury found the prisoner guilty of felonious receiving, and the learned recorder postponed the sentence until the opinion of the court for the consideration of Crown Cases Reserved could be taken.

The learned recorder referred the court to the cases enumerated in the note to the case of *Reg. v. Muttons* ⁽¹⁾, and requested the opinion of the court as to whether the conviction was right.

Marshall, for the prisoner: A wife cannot steal her husband's goods, and, therefore, no one receiving them from her can be guilty of receiving. (He was stopped by the court.)

Rose, for the prosecution: Adultery determines the wife's quality as such with reference to the husband's goods. Her dealing with them after such adultery, if the other necessary ingredients of larceny be present, is stealing, and the adulterer who receives them from her may be guilty of receiving. *Reg. v. Deer* ⁽²⁾ and *Reg. v. Featherstone* ⁽³⁾ are expressly in point.

[DENMAN, J.: The Law Journal Report of each of those cases shows the real ground of decision. In the first case the goods were such that the wife could not have been the person to remove the whole of them from her husband's house, and, therefore, the prisoner received them from some one other than the wife. In the other the prisoner was himself a party to the removal, and was guilty not merely of receiving but of stealing.]

KELLY, C.B.: This conviction cannot be sustained. Husband and wife are one person in law, and the wife [311] cannot steal her husband's goods, whether she has committed adultery or not. There is a class of cases in which the question of adultery is very material. Where the adulterer, acting in concert with the wife, takes the husband's goods, the fact of adultery, if established, by revoking the wife's authority to dispose of her husband's goods, may make that larceny on the part of the adulterer which otherwise would not have been so. But here the prisoner has not been convicted of stealing, and probably the facts would not have supported such a conviction. He has been convicted of receiving, and that conviction cannot be sustained without

⁽¹⁾ L. & C. Cr. C., 511; 34 L. J. (M.C.), 54. ⁽²⁾ Dears. Cr. C., 369; 23 L. J. (M.C.), 127.

⁽³⁾ L. & C. Cr. C., 240; 32 L. J. (M.C.), 33.

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proof of a stealing by some other person. There is no evidence of any such stealing.

MELLOR, LUSH and DENMAN, JJ., and HUDDLESTON, B., concurred.

Conviction quashed.

Solicitors for prosecution: *Chester & Co.*, for E. Tenant, Hanley.

Solicitor for prisoner: *E. W. Hollingshead*, Tunstal.

See 2 Eng. Rep., 176 note; *Regina v. Taylor*, 10 Eng. Rep., 509.

An instruction, according to the facts, was held to be correctly given by the court to the jury, on the trial of the defendant for larceny, as follows: "It appearing from all the evidence in the case that the goods were taken by the defendant by the consent of the owner's wife, under an agreement with her that he was to dispose of the same and account for the proceeds to her, and there being no evidence tending to

show that there was any adulterous intercourse, actual or contemplated, between the defendant and said wife, you will return a verdict of not guilty:" *State v. Banks*, 48 Ind., 197.

In *People v. Stokes* (40 Cal., 599), it was held that where one feloniously received in one county goods stolen in another, he not being present or participating therein, he could only be indicted and convicted for receiving stolen goods in the county in which he so received the goods.

[2 Queen's Bench Division, 311.]

April 21, 1877.

[CROWN CASE RESERVED.]

THE QUEEN V. RICHARDS.

Accessory after the Fact—Murder—Manslaughter—Indictment as accessory to Murder—Conviction as accessory to Manslaughter.

Several persons were tried upon one indictment, some as principals in murder, others as accessories after the fact. The principals were convicted of manslaughter: *Held*, that those charged as accessories might rightly be convicted as accessories to manslaughter.

CASE stated by Cockburn, C.J.

The prisoners were tried at the last assizes for the county of Somerset on an indictment which, after charging one George Baker and three persons, named George Hutchings the elder, Giles Hutchings, and George Hutchings the younger, with the *wilful murder of one Nathaniel Cox, went on to charge the two prisoners George and James Richards with having, well knowing the said George Hutchings the elder, Giles Hutchings, and George Hutchings the younger, to have committed the said murder, afterwards feloniously received, comforted, harbored, assisted, and maintained them.

On the trial the prisoners charged with murder were found guilty of manslaughter. The two Richards were found

guilty as accessories after the fact, whereupon it was objected in arrest of judgment, that the prisoners being charged in the indictment as accessories after the fact to murder, could not be found guilty of having been accessories after the fact to manslaughter.

The learned judge was of opinion that as, according to the established law, the offence of manslaughter is involved in that of murder, and a person indicted for murder may be convicted under such an indictment of manslaughter, so a person charged as accessory to murder may be found guilty on such an indictment of having been accessory to manslaughter. But as the point appeared to have never before presented itself for decision, he reserved it for the consideration of this court and requested their decision upon it.

Cole, Q.C., for the prisoners: The question whether a person indicted as accessory to murder can be convicted as accessory to manslaughter has never been decided. The case of *Goff v. Biby* ⁽¹⁾ was the case of an appeal of murder, and the principles applicable to an appeal and an indictment are not necessarily the same. The opinion expressed by Tindal, C.J., in *Reg. v. Greenacre* ⁽²⁾ is a mere *dictum*. Great practical difficulties might arise if the present conviction be upheld. A man might at one and the same time, and by one and the same act, harbor four persons who had been concerned in a homicide. Two of the principals might be apprehended and tried upon such facts as to warrant only a conviction for manslaughter, and they would accordingly be convicted of manslaughter, and the harborer as an accessory. Afterwards the other two might be apprehended and charged with murder, and the harborer be indicted as accessory to murder. He would *then be liable to [313] be convicted a second time of the same offence, that is, as accessory to manslaughter, in respect of the very same act for which he had been already convicted. Yet he could neither plead *autrefois acquit* nor *autrefois convict*.

Hooper, for the prosecution, was not called upon.

COCKBURN, C.J.: We are all agreed that this conviction should be affirmed. Mr. Cole's difficulty as to pleading is easily answered. One who harbors several felons, though the principals may have committed a joint crime, is guilty of a separate offence for each person whom he harbors. And, therefore, if he were tried with some of the principals and convicted as an accessory in harboring them, and afterwards were tried with the other principals and charged as

⁽¹⁾ Cro. Eliz., 540.

⁽²⁾ 8 C. & P., 35.

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an accessory in harboring them, he would be tried, not a second time for the same offence, but for a different offence.

As to the main point, a man charged with murder may be convicted of manslaughter, because murder involves the lesser charge of felonious homicide; so, for the same reason, one charged as accessory to murder may be convicted as accessory to manslaughter. The one thing follows from the other.

MELLOR, GROVE, LINDLEY and HAWKINS, JJ., concurred.

Conviction affirmed.

Solicitors for prosecution: *Combe & Wainwright*, for R. N. Howard, Weymouth.

Solicitors for prisoner: *Reed & Cook*, Bridgwater.

See 12 Eng. Rep., 638. note; 17 Alb. L. J., 420.

A woman who voluntarily takes a potion administered to her for the purpose of causing an abortion, is not an accomplice in the crime of the person administering it, the law making it no crime in her to take the potion: *State v. Hyer*, 39 N. J. Law Rep., 598; *State v. Owens*, 22 Minn., 238.

A detective who joins a criminal organization for the purpose of exposing it and bringing criminals to punishment, and honestly carries out that design, is not an accessory before the fact, although he may have encouraged and counselled parties who were about to commit crime, if in so doing he intended that they should be discovered and punished, and his testimony, therefore, is not to be treated as that of an infamous witness: *Campbell v. Commonwealth*, 84 Penn. St. R., 187.

The prisoner C. was indicted for aiding and abetting one M. in a murder, of which M. was convicted. It appeared that about six in the evening the deceased was with R. and his wife on the river bank at Amherstburgh, standing near a pile of wood. She saw M. standing behind the pile, who, on deceased going up to him, struck deceased with a stick, of which he died; deceased ran, when two other men sprang out and followed him, but in a few seconds two of them returned and assaulted her and her husband. She could not identify the prisoner. Two other witnesses saw the blow struck, and identified M.; and one witness, B., swore that about six on that evening deceased left his office with R. and his wife, and that about

twenty minutes after he saw the prisoner, with M. and another, go into the vacant lot where the wood pile was, M. having a stick in his hand, and heard M. say to the others, "Let us go for him." It was also proved by others that the three were together before the affray, and in a saloon together about nine o'clock afterwards.

Held, that there was no sufficient evidence to warrant the prisoner's conviction, for there was no direct proof that he was present when the blow was struck, and no evidence whatever that he and the others were together with any common unlawful purpose; and the words spoken were in themselves unimportant: *Queen v. Curtley*, 27 U. C. Q. B., 613.

If one person assaults another, and others are present acting together with the former, or, being present and knowing his unlawful intent, aid or encourage him in the commission of the offense, all are principal offenders, and a blow by one is a blow by each and all.

Certain women and adult males were jointly indicted for an aggravated assault and battery upon a female. The court below charged the jury, in effect, that though the offence of the women may have been only a simple assault and battery, yet that of their male confederates, if they were present, aiding, etc., would be aggravated assault and battery. Held, that, if there was error in this charge, it was not to the prejudice of any of the defendants, but because it was too favorable to the female defendants, who, it is intimated, may, by their presence and participation, have been equally inculpated with their

male confederates: *Dunman v. State*, 1 Tex. App., 593.

On a trial for theft of a cow, the court below instructed the jury, in effect, that if the defendants were present and in any way participated in killing the cow, then it devolved on them to prove circumstances tending to excuse or justify their participation, unless such circumstances appeared from the evidence adduced by the state. Held, that the instruction was erroneous in two respects: 1st, because it pretermits the guilty knowledge necessary to inculcate the defendants as aiders and abettors; and 2d, because it ignores the presumption of innocence and doctrine of reasonable doubt, and misdirected the jury as to the burden of proof: *Chapman v. State*, 1 Tex. App., 728.

Where two persons go out to fight with their fists by consent, and do fight with each other, each is guilty of an assault, although there is no anger or

mutual ill-will: *Com. v. Collberg*, 119 Mass., 350.

Assault and battery for beating plaintiff. Pleas, not guilty, and leave and license. On the argument, defendant's counsel contended that because the plaintiff had previously challenged defendant to fight, the plea of leave and license was sustained, and that plaintiff should have replied an excess or unfair advantage if he relied thereon. Held, that (admitting the general principle) the facts did not support that view, and the rule was discharged: *St. John v. Parr*, 7 U. C. Com. Pl., 142.

An accessory must be indicted as such. He cannot be convicted if indicted as a principal: *Reynolds v. State*, 88 Ills., 479, overruling *Yoe v. People*, 49 Ills., 410.

There is no distinction between principals in first and second degree. All are guilty as principals: *State v. Hollenscheit*, 61 Missouri, 302.

CRIMINAL LAW CASES.

[14 Cox's Criminal Cases, 31.]

COURT OF CRIMINAL APPEAL ⁽¹⁾.

Saturday, Jan. 19, 1878.

(Before Cockburn, C.J., Cleasby, B., Lindley, J., Manisty, J., and Hawkins, J.)

31] *REG. V. KNIGHT ⁽²⁾.

Debtors Act 1869—Indictment—Aider by verdict—Obtaining credit by false pretences and fraudulently disposing of goods within four months before liquidation—32 & 33 Vict. c. 62, s. 11, sub-sects. 14 and 15.

An indictment charged that the defendant, a trader, "did within four months next before the commencement of the liquidation by arrangement of his affairs obtain from W. goods upon credit under the false pretence, &c., with intent to defraud." And in another count in similar terms the defendant was charged with unlawfully 32] disposing of the goods otherwise than in the ordinary *way of his trade. Both counts were framed under sect. 11, sub-sects. 14 and 15 of 32 & 33 Vict. c. 62.

Held, that the counts were good after verdict, and sufficiently averred that the defendant was a person whose affairs were liquidated by arrangement within the meaning of sect. 11.

* At the general quarter sessions of the peace for the borough of Birmingham, held at Birmingham, before the recorder, on the 22d day of October, 1877, an indictment, of which the following is a copy, came on to be tried against the defendant, framed upon sub-sects. 14 and 15 of 32 & 33 Vict. c. 62 (The Debtors Act, 1869).

Borough of Birmingham, to wit: The jurors for our Lady the Queen, upon their oaths present, that heretofore and before the committing of the offences by William Augustus Knight as hereinafter mentioned, the said William Augustus Knight was a trader within the true intent and meaning of the laws then and now in force relating to bankrupts. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 12th day of April, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from Westwick & Co., spice merchants of London, five cases of Cochin ginger upon credit, under the false pre-

⁽¹⁾ As the Crown Cases Reserved are now published in the Queen's Bench Division, it is deemed advisable to publish criminal cases from Cox's Criminal Cases following that Division.

N. C. M.

⁽²⁾ Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

tence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

2d count. And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 9th day of May, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), five cases of Cochin ginger, which he had obtained on credit, and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

3d count. And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 3d day of May, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from Joseph Brook & Co., of Birmingham, twenty cads (or boxes) of Caper tea upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

*4th count. And the jurors aforesaid, upon their oath [33 aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 8th day of May, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), twenty cads (or boxes) of Caper tea which he had obtained on credit and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

5th count. And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 28th day of May, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from William Lloyd, of Birmingham aforesaid, three boxes of Toby & Booth's bacon, and two boxes of Toby &

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Booth's hams, upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

6th count. And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the said 28th day of May, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), three boxes of Toby & Booth's bacon, and two boxes of Toby & Booth's hams, which he had obtained upon credit and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

7th count. And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 1st day of June, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from H. H. and S. Budgett & Co., of Bristol, five boxes of bacon upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

8th count. And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on the said 1st day of June, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement *of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), five boxes of bacon which he had obtained upon credit and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

9th count. And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 7th day of June, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from Charles Wood & Co., of Liverpool, ten boxes

of cheese upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

10th count. And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the said 7th day of June, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), a large quantity of cheese which he had obtained upon credit, and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

In the course of the trial proof was duly made, by the production by an official of the County Court of Warwickshire, holden at Birmingham, of the proceedings under the seal of the said court relating thereto :

1. That the said William Augustus Knight had, upon the 19th of June, 1877, filed in the said court his petition for the liquidation of his affairs by arrangement under the provisions of 32 & 33 Vict. c. 71 (The Bankruptcy Act, 1869).

2. That trustees under the said liquidation had been subsequently duly appointed.

3. That the liquidation proceedings under the said petition were still pending.

The defendant was acquitted on the third and fourth counts of the said indictment, and convicted on the remaining eight counts.

After the verdict was returned by the jury, but before sentence was passed, a motion was made by the counsel for the defendant in arrest of judgment to quash the counts of the said indictment on which the defendant had been convicted, on the ground that they were bad on the face of them, and were not cured by the verdict, inasmuch as—

1. The above-mentioned counts of the said indictment *contained no averment of any offence under the [35 Debtors Act, 1869.

2. There was no averment in any of the above-mentioned counts of the said indictment that the defendant was a person adjudged bankrupt, or was a person whose affairs were

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or had been liquidated by arrangement in pursuance of the Bankruptcy Act, 1869.

3. There was no averment in any of the above-mentioned counts of the said indictment of the filing of any petition for liquidation of his affairs by arrangement pursuant to the Bankruptcy Act, 1869, by the said defendant or the appointment of a trustee under any such liquidation proceedings.

4. There was no substantive or certain averment of any liquidation proceedings whatever under the Bankruptcy Act, 1859, in any of the above-mentioned counts of the said indictment.

Upon hearing counsel on both sides I overruled the objection, but on the application of the counsel for the defendant I stated my intention to send up a case for the decision of the Court for Crown Cases Reserved; and I therefore postponed judgment on the conviction, and discharged the defendant on recognizance of bail to appear and receive judgment if called upon.

If the court should be of opinion that all the above-mentioned counts of the said indictment are bad after verdict, then they are to be quashed; but if the court should be of opinion that any of the said counts are good, then the verdict on those counts is to stand, and the defendant is to come up for judgment accordingly.

R. Harries (*T. M. Culmore* with him), for the defendant: It is submitted that the indictment is bad after verdict. The 32 & 33 Vict. c. 62, s. 11, begins thus: "Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall in each of the cases following be deemed guilty of a misdemeanor." Then sub-sects. 14 and 15, on which the indictment is framed, enact: "If within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he being a trader, obtains, upon the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intent to defraud." Sub-sect. 15: "If within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he being a trader, pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud." In order to convict a person under

those sub-sections it must appear either that he has been adjudicated a bankrupt, or that his affairs have been liquidated by arrangement; and the indictment must show *on the face of it that the defendant is a person on [36 whom those sub-sections can operate. A man may file a petition for liquidation, but if the liquidation is not carried out and goes off, he is not within the purview of sect. 11 (*Reg. v. Oliver and Austin*, 13 Cox's C. C., 588). The principle of that case is applicable to this case. [COCKBURN, C.J.: You must read the indictment with reference to sect. 19 of the Debtors Act, which seems to me to set at naught the rules of criminal pleading: "In an indictment for an offence under this act it shall be sufficient to set forth the substance of the offence charged in the words of this act; specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court under, the Bankruptcy Act, 1869." In *Reg. v. Oliver and Austin*, Lush, J., said that sect. 19 only makes an indictment good when it states the offence in substance. This indictment does not state the offence in substance, for it nowhere avers that the defendant's affairs were liquidated by arrangement, which is a necessary ingredient to bring the defendant within the operation of sect. 11. The only difference between the present case and *Reg. v. Oliver and Austin* is, that that was a bankruptcy and the present a liquidation by arrangement. [MANISTY, J.: No; the indictment was very different. In that case Kelly, C.B., said: "I am of opinion that no such amendment or intendment as suggested can be made, when the contrary is alleged as here." We have not that difficulty to get over in this case. LINDLEY, J.: Do you contend that the words "are liquidated," in sect. 11, mean "have been liquidated," and that no offence can be committed by a person when the liquidation turns out abortive?] Yes. Again, the indictment does not show that the liquidation ever commenced, for by sect. 125, sub-sect. 4, of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), a liquidation by arrangement shall be deemed to commence from the date of the appointment of the trustee. It does not appear on the face of the indictment that a trustee was ever appointed. So that the most that can be inferred from the indictment is that at some time proceedings for a liquidation had commenced, but what became of them does not appear; they may have dropped, or the defendant may have paid 20s. in the pound.

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Rosher, for the prosecution: The indictment is good after verdict. In *Reg. v. Oliver and Austin* the motion to quash the indictment was expressly made on the ground that it was bad on the face of it, and repugnant; and the repugnancy was the chief difficulty in that case. Here there is no repugnancy, and according to sect. 19 of the Debtors Act, it is sufficient, for it contains all the requisites to constitute the offences charged; it follows the words of sect. 11, and shows substantially the offence charged. Secondly, the objection was made too late. If it had been taken before verdict, an amendment might have *been made. Again, this, if a defect at all, is one that is cured by the 7 Geo. 4, c. 64, s. 21, which enacts that, where the offence charged has been created by any statute, the indictment shall, after verdict, be held sufficient if it describe the offence in the words of the statute. Cases cited: *Nash v. The Queen* (4 Best & Sm., 935; 33 L. J., 94, M. C.); *Hayman v. The Queen* (8 L. Rep., Q.B., 102; 12 Cox's C. C., 383); *Reg. v. Goldsmith* (L. Rep., 2 C. C. R., 74; 12 Cox's C. C., 479).

Harris, in reply: No doubt a defective averment, as in the cases cited, may be cured by proof, and the objection is too late after verdict; but in the present case it is contended there was no averment at all of any offence. It is not enough to show that there has been a commencement of a liquidation, which is the utmost that can be inferred in the present case.

COCKBURN, C.J.: I am of opinion that this indictment should be upheld and that the conviction should stand. In the first place, as to the case of *Reg. v. Oliver and Austin*, that is not an authority in point in this case. The indictment in that case contained an allegation not to be found in this indictment, viz., "that before the committing of the offence next hereinafter mentioned, to wit, on, &c., I. Oliver and T. Austin were adjudicated bankrupts, and that they afterwards, with intent to defraud, &c., within four months next before the presentation of a bankruptcy petition against them," committed the offence charged. The objection was that it was not stated in that indictment in a form sufficient to satisfy the statute, that there was any adjudication of bankruptcy upon the petition within four months of which it was alleged that the bankrupts had committed the offence—the adjudication of bankruptcy being the *status à quo* the offence proceeds. It cannot be disputed that an adjudication in bankruptcy, or a liquidation by arrangement in pursuance of the Bankruptcy Act, 1869, is essential to the completion of the offences created by sect. 11 of the

Debtors Act, 1869, and, as in this indictment, there is no express allegation that the defendant's affairs were being liquidated, the indictment would be defective unless the defect is cured by sect. 19 of the act, which uses strong terms, or is aided by verdict. There is a difficulty in getting over that enactment, framed as it is in such general terms; but at the same time I am reluctant to disregard the rule of criminal pleading that an indictment must state all the matters that are essential to the charge contained in it. Sect. 19 may be construed, I think, not to do away with the necessity of the allegation of the essential matters which constitute the offence, but to prevent the necessity of alleging the details of the adjudication of bankruptcy or liquidation by arrangement; and I think it is sufficient to allege in the indictment that the defendant was adjudicated a bankrupt, or that his affairs were liquidated by arrangement, and that he committed the offence within four months before the presentation of the bankruptcy petition or the commencement of the liquidation. It is not necessary in the *present [38 case to decide whether the allegation in this indictment is sufficient upon demurrer, for we are dealing with an objection made to the indictment after verdict. Now, I think that, though it is informally stated in the indictment, yet that it may be implied by reasonable intendment from the indictment that the defendant's affairs were being liquidated by arrangement, and if so the indictment may be sustained. Now, the indictment states that the defendant did, within four months before the commencement of the liquidation by arrangement of his affairs, obtain, &c., which seems to me to amount, by necessary implication, to an allegation that there was a liquidation by arrangement of the defendant's affairs under the statute. That being so, I am of opinion that the averment may, after verdict, be treated as an informal one, and cured by necessary intendment. I give no opinion whether it was an objection or not which might have been taken before verdict.

CLEASBY, B.: I also think that the conviction should be affirmed. It appears to me that there was nothing in the objection to the indictment after it was proved, that trustees were duly appointed, for by sect. 125, sub-sect. 7, of the Bankruptcy Act, 1869, the appointment of a trustee under a liquidation is to be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy, so that at no time can there be a liquidation by arrangement unless a trustee is duly appointed. Then

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as to the goodness of the indictment, we must look at sect. 19 of the Debtors Act, 1869, which enacts that "in an indictment for an offence under this act, it shall be sufficient to set forth the substance of the offence charged in the words of the act,"—very general words. In the present indictment the words of the act are followed, and the defect alleged is the want of a distinct allegation that there was a liquidation by arrangement of the defendant's affairs. Now, sect. 19 says that it shall not be necessary to allege or set forth any adjudication under the Bankruptcy Act, 1869, or, what is the same thing, any liquidation by arrangement of the defendant's affairs. The words of the indictment "within four months next before the commencement of the liquidation by arrangement" are equivalent to within four months next before the appointment of trustees, which, by sect. 125, sub-sect. 7, of the Bankruptcy Act, 1869, are "to be deemed equivalent, and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy." I think, therefore, that the averment was sufficient after verdict.

LINDLEY, J.: I also think that the conviction ought to be affirmed. . . After verdict it is unnecessary to say whether the indictment might or might not have been quashed if the objection had been taken by demurrer. It appears to me, I must confess, to be drawn in a lax form. There is a marked distinction between this indictment and that in *Reg. 39] v. Oliver and Austin*, *and that case, to my mind, appears to support our decision in this case. It is necessarily implied in the words "within four months next before the commencement of the liquidation by arrangement of the defendant's affairs," that the defendant had presented a petition for the liquidation of his affairs by arrangement, which must mean that the defendant was a person who had presented a petition for the liquidation of his affairs by arrangement, and that a trustee had been appointed. In correct legal language no proceedings for a liquidation of a debtor's affairs by arrangement do commence until a trustee has been appointed. Therefore the averment must mean that the liquidation proceedings had commenced and a trustee been appointed. In *Reg. v. Oliver and Austin* the indictment said that the "defendants were adjudicated bankrupts, and that afterwards, with intent to defraud, &c., within four months next before the presentation of a bankruptcy petition against them," they committed the offence charged, and the court held that they were unable to say whether the defendants had been adjudicated bankrupts at

all upon the presentation of the petition mentioned. In the present case the averment necessarily involves that there was a liquidation by arrangement. The only other point material to be noticed is that the statute (sect. 11) does not mean a person whose affairs have been liquidated by arrangement, but are being liquidated by arrangement. Construing it after verdict I think that this indictment does sufficiently set forth the substance of the offence charged.

MANISTY, J.: I also think that the conviction should be upheld. Liquidation of the affairs of a debtor by arrangement is the creation of the Bankruptcy Act, 1869, s. 125; and it does not commence by the presentation of a petition, but by a meeting of creditors passing a special resolution, and appointing a trustee. The offence charged in this indictment is that the defendant, being a trader within the meaning of the bankrupt laws, "did within four months next before the commencement of the liquidation by arrangement of his affairs," commit the offence charged. All that is necessary to set out according to sect. 19 is the substance of the offence charged in the words of the act specifying the offence. I agree with my Brother Lindley that sect. 11 means a person whose affairs are being liquidated by arrangement. Then how could the offence be committed within four months next before the commencement of the liquidation, unless the act which constitutes the commencement had been done. As at present advised, I think the indictment is good upon the face of it, but after verdict I think it was clearly sufficient.

HAWKINS, J.: I also think that the conviction should be affirmed. I base my judgment on the ground that the objection to the indictment was not taken until after verdict. If the objection had been taken in time I doubt whether the indictment could be considered good. I find the rule on this subject thus *laid down: "Where there is any [40 defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict by the common law" (*Stennell v. Hogg*, 1 Wms. Saund., 22). Now what facts would it have been necessary to prove in support of the charge in the indictment? It would be necessary to prove, first, that the defendant was a trader; secondly, that his affairs were being liquidated by arrange-

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ment; thirdly, that he obtained goods on credit with intent to defraud; fourthly, within four months before the commencement of the liquidation. After verdict it must be taken that all these matters were found by the jury, and therefore I think that this indictment is sufficient after verdict.

Conviction affirmed.

[14 Coxe's Criminal Cases, 40.]

NORTH AND SOUTH WALES CIRCUIT.

Chester Winter Assizes. Feb. 1, 5 and 6, 1878.

(Before Mr. Justice Lush.)

REG. V. ELLEN HEESOM (¹).

Murder—Poisoning—Postponement before bill sent up—Evidence—Deposition—Pregnancy of witness—Evidence—Subsequent and previous deaths by poison—Motive in each case admissible.

1. Upon a charge of murder, by poison, the presentment of a bill to the grand jury cannot be postponed to the next assizes, on the ground that other and like charges may before that time be brought against the prisoner, and if no bill is so presented the prisoner is entitled to be discharged.

2. It was proposed to read, on the trial at the assizes, the deposition of a witness called before the magistrates, on the same charge, now absent by reason of pregnancy. Evidence given by a doctor on February the 5th, that he had last seen the witness on the 29th day of January, and that she then was daily expecting her confinement, *but which had not yet taken place, was held to be sufficient to entitle the deposition to be read at the trial on the 5th of February.

3. Upon an indictment for murder by poison of S. in October, 1877, evidence is admissible of the previous and subsequent deaths of J. and L., under like circumstances and from similar symptoms, to show that the poisoning was not accidental: and where it is proved that a motive for the death of S. might exist, by the fact of the prisoner having insured the life of S. in a benefit and insurance society, evidence may also be given upon the same indictment that there might be an equal motive for the deaths of J. and L., by showing that they also were each of them insured by the prisoner in the same or kindred societies.

ELLEN HEESOM, otherwise Ellen Johnson, was charged before the magistrates with the murder of her infant child Sarah Heesom, by poison, at Lower Walton, on the 3d day of October, 1877, and also with a like murder of her mother Lydia Sykes, at the same place, on the 5th day of November, 1877, and committed for trial on those two charges.

J. W. Bowen, Q.C., and E. Julyan Dunn were instructed to prosecute on behalf of the treasury.

E. Swetenham, for the prisoner.

The prisoner having been committed on or about the 22d day of January, 1878, by the magistrates and coroner for

(¹) Reported by E. JULYAN DUNN, Esq. (with the approval and concurrence of Mr. Justice Lush).

trial for these murders, at the winter assizes held at Chester on February the 1st and following days, before a bill was sent up to the grand jury, *Bowen*, Q.C. applied to the court to allow the cases against the prisoner to be postponed to the next assizes. His reasons for so applying were as follows: Between the 22d day of Jannary and the commission day certain evidence had been obtained implicating the prisoner in a third charge of murder under like facts, which would be included in the investigations of the two cases on which the prisoner had already been committed for trial. But the chemical analysis was not yet completed in this third death, and, as this class of evidence would be an important element in the case, he did not wish to proceed, even at this early stage, and to the prejudice of the prisoner. [LUSH, J.: How can I postpone the trial until a bill is found? If one is not found at these assizes, the prisoner will be entitled to her discharge, on bail, though of course she may be arrested immediately afterwards on the new charge.]

Bowen, Q.C., cited *Reg. v. Palmer* (6 C. & P., 652).

LUSH, J.: That case will not help you, it being an application founded on the absence of a material witness for the Crown, which is provided for by the Habeas Corpus Act (31 Chas. 2, c. 2, s. 7). If, after a bill is found, you renew your application, I will then consider the matter; but, unless the prisoner consents, I cannot say that at present I see any ground for a postponement.

A bill having been found and the prisoner wishing the *case to proceed, the trial commenced on the 5th of [42 February, the indictment for murdering Sarah Heesom being the one taken.

During its progress counsel for the Crown proposed to put in the deposition of Mary Owen, a witness who had been called before the magistrates and who was unable to attend to give evidence at Chester. They called a doctor, who testified that he had seen the witness Mrs. Owen on the 29th day of January last and that she was then daily expecting her confinement, but he did not know if she had yet been actually confined; she lived about an hour's journey from Chester, but it would be dangerous for her to travel that distance.

Swetenham thereupon contended that this was not sufficient to entitle the deposition to be read, and referred to Archbold's Criminal Pleading, p. 250, 17th ed., and the cases therein cited: *R. v. Parker* (York Summer Assizes, 1862); and *R. v. Omant* (6 Cox's C. C., 466).

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LUSH, J.: Pregnancy of a witness is not of itself sufficient to enable the deposition to be read; but, the question here is whether the witness is too ill to travel. I think upon the evidence that she is, and shall therefore admit the deposition in evidence.

The case for the prosecution was as follows: The prisoner in the year 1870 was working at some glass works near Warrington, where they were in the habit of using white arsenic. She married a man named Johnson, and had a child by him named Lydia. She afterwards became acquainted with another man called Edward Heesom, with whom she had lived for about four years—up to in fact the institution of the present proceedings, they had lived together as man and wife, and were believed by the neighbors to be married. The result of her connection with Heesom was the birth of two children, Elizabeth and Sarah. In 1876 they went to live at Lower Walton, nearer Warrington, and at that time the family consisted of Edward Heesom, the prisoner, Lydia Johnson, and Elizabeth Heesom. The child Sarah Heesom was born on the 2d day of October, 1876, and after the removal to Walton. Neighbors were called, as witnesses, who proved that up to 3d day of October, 1877, this child Sarah was a healthy one, though unable to walk. On that day, about half-past twelve, the child was seen in its usual condition; but between one and two Mrs. Moss, one of the neighbors, found her very ill, vomiting and purging most violently. As the child was teething, the doctor who was called in believed that the convulsions it also suffered from were thus produced, and when the death of the child followed, on the next day, he gave a certificate to that effect. No suspicion of foul play had then arisen, but afterwards the body was exhumed by order of the Secretary of State, and on the stomach being analyzed, three grains of arsenic were found in it, half that quantity being quite sufficient to cause the death of an infant. It was also proved that in 1870 the prisoner might possibly 43] have got at the white arsenic in the glass works *where she worked, no coloring matter, such as chemists are obliged to mix with arsenic on ordinary sale, being found in the child's stomach; and it was further proved that in March, 1876, the prisoner had stated to two neighbors that she had been cleaning her beds with arsenic, and in one instance had offered to give her friend some she had then in a particular cupboard for the same purpose. It was also proved that in November, 1876, the prisoner had effected an insurance on the child's life in the Prudential Assurance

Society through one of its agents named James Whitaker. By the payment of a penny a week she would be entitled to about 30s. if the child lived twelve months; and the sum she could so claim she applied for and received within a few days after the child's death. Moreover, Edward Heesom, the prisoner's alleged husband, was insured in a benefit club, and would therefore be entitled to some small sum (about 20s.) on the death of any of his children; the sum to be paid varying with the age of the child at its decease.

In order to show that the poisoning was not accidental, it was proposed to prove, on the authority of *Reg. v. Cotton* (12 Cox's C. C., 400), and *Reg. v. Roden* (Idem, 630), and *Reg. v. Garner* (4 F. & F., 346), that Lydia Johnson had died in March, 1876, in the prisoner's house, and had immediately before her death unaccountably suffered from violent vomitings, purgings, cramps, convulsions, and other similar symptoms to those noticed in Sarah Heesom's illness on the 3d day of October and just preceding her death—and also that Lydia in fact died from arsenical poisoning. To this no objection was raised by the court or counsel when the above cases had been cited, and evidence to this effect was therefore given.

It was also proposed to further strengthen the theory for the prosecution, by showing that the prisoner's mother, Lydia Sykes, came to visit the Heesoms on the 3d day of November, 1877, and that the next day she, also, was inexplicably seized in exactly the same way as the two children who had died by poison had been taken,—and that Mrs. Sykes, in fact, also died from it.

LUSH, J.: Can you give evidence of a subsequent poisoning as well as of a previous one?

Dunn submitted that such evidence could be given upon the authority of *Reg. v. Gearing* (18 L. J., M. C., 215), where Pollock, C.B., after consultation with Alderson, B., and Talfourd, J., said: "I think such evidence, i.e., of a subsequent poisoning, may be given. The tendency of it is to prove and confirm that the proof of the death of the husband already given, whether felonious or not, was occasioned by arsenic; in this view of the case, I think it is wholly immaterial whether the deaths of the two sons took place before or after the husband's death (which was the subject of the indictment). The domestic history of the family during the period in which all the deaths occurred is also receivable in evidence, to show that during that time arsenic had been taken by four members of it, with a view to

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44] enable *the jury to determine whether such taking was accidental or not. Nor is such evidence inadmissible as having a tendency to prove or create a suspicion of a subsequent felony." See also *Reg. v. Dossett* (2 C. & K., 306).

LUSH, J.: Very well, then, I shall follow that case, and admit evidence relating to Mrs. Sykes' death, in November, 1877. Such evidence was therefore given.

2d day. Feb. 6. It was still further proposed to show, not only that Sarah Heesom's life was insured by the prisoner in the Prudential and another society, but also that by the death of both Lydia Johnson and Mrs. Sykes, the prisoner would benefit pecuniarily, she having insured and paid premiums on their lives. To do this, the Crown called

The Rev. Richard Greenall, vicar of St. Thomas, Stockton Heath, who testified that the books of that Church Sunday School Sick and Burial Club showed that Lydia Johnson entered the club in 1874.

Stoetenham here interposed, saying that this was extending the doctrine, accepted on the previous day, as to evidence being admissible of other poisonings, if the Crown were allowed to show motives for those deaths. Would his Lordship reserve the point?

LUSH, J., said: I cannot do that; it might defeat the whole proceedings. If I entertained any doubt, I should reject the evidence. I cannot help thinking it is within the principle of *Reg. v. Gearing*, namely, that evidence of the domestic history of the family during a period of four deaths in that family by poison can be received to enable the jury to decide under what circumstances the poison had been taken. If there had been no case on the point I would have paused to consider (continued his Lordship) whether the evidence could be received; but, after the decision quoted, and with which I am quite satisfied, I have no doubt that it is competent to show that the death of the child Lydia Johnson was not due to the accidental taking of arsenic. To prove the intention you may show the motive, and this is a link in the chain of evidence. Though I feel satisfied the point is involved in the Chief Baron's judgment, I will consult my colleagues on my return to town (').

Whereupon Mr. Greenall proved that the prisoner received from the club £5 on the death of Lydia Johnson.

Evidence was also given that she received £6 from the Prudential Assurance Society on the happening of the same event, and it was also proved that the prisoner had insured her mother's life in, and, on the death of her mother, received

(') April 24, 1878. No case has been reserved upon the point. E. J. D.

a somewhat larger sum from, the same society; the policies in each case having been effected by the prisoner, and having been severally running but a short time before the deaths of the respective insured.

Verdict, guilty. Sentence, death; but execution was respited owing to the prisoner's pregnancy.

See 10 Eng. Rep., 512 note.

Proof of a distinct offence is not admissible upon a trial for another offence: *Wiley v. State*, 3 Cold. (Tenn.), 373; *Wilcox v. State*, 3 Heisk. (Tenn.), 116.

As a general rule, a distinct crime unconnected with that in the indictment, cannot be given in evidence against the defendant. That one crime may be evidence of another, there must have been a connection between them in the mind of the criminal, or the person must be so identified as to show that one committed both.

Should the judge not clearly see the connection, the defendant should have the benefit of the doubt, and the jury not be prejudiced by an independent fact, not evidence of the particular guilt. Defendant was indicted for murdering his wife by poison; there was evidence of his criminal intimacy with the wife of another man, on whose life was an insurance, the proceeds of which on his death the defendant endeavored to procure.

Held, that evidence that the husband died with the same symptoms as defendant's wife, and that he had been attended by the defendant, was inadmissible: *Shaffner v. Commonwealth*, 72 Penn. St. R., 60.

The plaintiff in error was tried and convicted of petit larceny, the offence having been committed while the complainant was changing a ten dollar bill for him on January 20, 1876. Upon the trial the prosecution was allowed to prove that he had attempted to commit the like crime in the same manner on the 29th of February, 1876, in order to prove intent. Held, that the evidence was inadmissible: *People v. Justices*, 10 Hun, 158, distinguishing *Weyman v. People* (4 Hun, 511); *Bielehovsky v. People* (3 id., 40).

On a trial for an assault with intent to commit a rape, the prosecution should not be permitted to introduce

in evidence the declarations of the defendant concerning his misconduct with females, other than the one he is charged with having attempted to violate: *The People v. Bowen*, 49 Cal., 654.

Evidence of taking other property than that alleged in the indictment to have been stolen is inadmissible, unless necessary to establish identity, in developing the *res gestæ*, or in making out the guilt of the accused by circumstances connected with the alleged theft, or to explain the intent with which the accused may have acted: *Jim Gilbraith v. The State*, 41 Texas Rep., 567.

The fundamental rule that evidence must correspond with allegations, and be confined to the issue, excludes proof of collateral facts which afford no reasonable presumption or inference pertinent to the issue joined. To this rule, however, there is an apparent exception when *knowledge* or *intent* is a material inquiry.

On a trial for wilful burning, a witness was allowed, over objection by the accused, to prove that accused had previously been incarcerated as a pick-pocket. Held, error; such proof was not only incompetent under the foregoing rule of evidence, but was calculated to deprive the accused of a fair trial of the case at bar: *Cesure v. The State*, 1 Texas Ct. of App., 19.

On the trial of a person charged with a crime, it is error to admit, for the purpose of showing that he was probably guilty of the offence charged, evidence of facts tending to show that he was guilty at another time of some other crime.

Trial for arson. A witness for the state, on his direct examination, testified that in a conversation with him on a certain occasion, the accused said to him, "I suppose you are going to send me up on that buggy scrape." On his cross-examination the witness explained

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that the words "buggy scrape" referred to a buggy which one L. had had the accused arrested for stealing, a few days before; and that witness had been employed by L. to look it up, and had recovered it. On his re-direct examination, the witness was permitted, against objection, to testify "what he knew and what he did in regard to that buggy scrape," and to detail facts having a strong tendency to show that the accused had stolen the buggy. Held, that this was new matter, not admissible within the rule for re-direct examination; and its admission was fatal error: *Schaser v. State*, 36 Wisc., 429.

No proof of the admission, by the defendant, of one distinct, substantive offence, is admissible upon his trial for the commission of another and *a fortiori* of an intention to commit such an offence: *Kincheton v. State*, 5 Humph. (Tenn.), 9.

The prosecution cannot show in the prisoner a tendency or disposition to commit the crime with which he is charged.

The prosecution cannot give in evidence other criminal acts of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact, with its circumstances, has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions: *State v. La Page*, 57 N. H., 245.

Upon the trial of an indictment for burglary, evidence that an article not laid in the indictment as part of the property stolen, was taken with the articles specified, and evidence tending to identify it with a similar article seen thereafter in the possession of the accused, is competent: *Foster v. People*, 63 N. Y., 619; *Brown v. State*, 26 Ohio St., 176.

Where guilty knowledge is an element of the offence, the rule that proof of a distinct offence is not admissible upon a trial for another offence does not obtain: *Whiteside v. State*, 4 Cold. (Tenn.), 180; *Graves v. Fitzgerald*, 6 Cold., 644; *Hackett v. Brown*, 2 Heisk. (Tenn.), 271.

Upon a trial for the offence of murder, where the only incentive to the act appears to have been robbery, it was competent to show that the defendant,

some week or ten days prior to the homicide, proposed to a witness to rob an old man and woman, who lived on the edge of town, and who had money "piled up:" *Stafford v. State*, 55 Geo., 591.

Testimony is admissible that tends directly to prove the defendant guilty of the crime charged, although it may also tend to prove a distinct felony, and thus prejudice the accused: *State v. Folwell*, 14 Kans., 105.

To show the motive for murder and to explain the prisoner's connection therewith, it is competent for the Commonwealth to give evidence of the purposes, practices and objects of a society organized for the commission of crime, and to prove that those who committed the murder were members of said organization, and that through its instrumentality it was committed: *Campbell v. Com.*, 84 Penn. St. R., 187.

Evidence of a subsequent distinct criminal act, but connected in character and purpose with the offence charged, is admissible at the trial of an indictment for the principal offence.

A. was indicted for arson, alleged to have been committed May 23, 1877. After slight evidence had been offered connecting the prisoner with the incendiary act, the Commonwealth offered to prove a subsequent attempt by the prisoner to burn the same property, on the 25th of the same month: Held, that the evidence was properly admitted as tending to show a guilty purpose, such as would make it probable that the same person had made the former attempt: *Kramer v. Com.*, 6 Weekly Notes Cases, Penn., 185.

Where two persons are murdered at the same time and place, and under circumstances evidencing that both acts were committed by the same person or persons, and were part of one and the same transaction or *res gestæ*, the death of the one and surrounding circumstances may be given in evidence upon the trial of the prisoner for the murder of the other, not as an independent crime, but as tending to show that the motive was one and the same which led to the murder of both at the same time: *Brown v. Commonwealth*, 76 Penn. St. R., 319, 2 Leg. Chron. Rep., 193, distinguishing *Shaffner v. Commonwealth* (72 Penn. St. R., 60).

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On the trial of a criminal cause, where a conversation, part of which is admissible in evidence, contains admissions tending to show that the defendant was charged with, or was guilty of, a similar offence before, the whole conversation may be given, if it cannot

be separated, but the jury should be instructed that the admissions should not be considered for any purpose connected with the guilt or innocence of the defendant, or the extent of punishment, if found guilty: *Fletcher v. State*, 49 Ind., 124.

[14 Cox's Criminal Cases, 45.]

NORTH AND SOUTH WALES CIRCUIT.

Chester Summer Assizes, 1877.

(Before Lord Justice Bramwell).

*REG. V. JAMES CHAPPELL BENNETT ⁽¹⁾⁽²⁾. [45]*Bigamy—Absence for less than seven years—Bona fide belief of death.*

In an indictment for bigamy evidence is not admissible to show that the prisoner honestly believed that his first wife was dead, when he married a second, within seven years of his last having heard of or seen the first wife.

Semble, however reasonable such a belief may be, it can only be used in mitigation of punishment after conviction.

JAMES CHAPPELL BENNETT, described as an auctioneer, was indicted for bigamy by going through the ceremony of marriage with Margaret Ann Dobbin at Walton, Lancashire, on the 30th day of April, 1876, his former wife being then alive.

E. J. Dunn prosecuted; *B. F. Williams* defended.

It was proved that the prisoner married a lady named Serjeant, at Norwood, in November, 1869, and that he lived with her some little time and then left her. He afterwards went through the form of marriage with Miss Dobbin, on the 30th day of April, 1876, at Booth, Walton, Lancashire, representing himself to be a widower. Miss Dobbin, on being cross-examined, stated that the prisoner while with her treated her very well, but, upon re-examination, she admitted that he had only lived with her a short time after the ceremony, and, although he occasionally corresponded with her from Ireland, for twelve months he had sent her but £5 or so, to live on during that period, and that out of her fortune of £100 he had had £90, which he had entirely spent on himself.

Williams proposed to ask a witness if she had not told the prisoner before his second marriage that his first wife was dead, and also to give evidence that the prisoner said he had made inquiries in 1875, and found her reported to be dead.

⁽¹⁾ Reported by E. JULYAN DUNN, Esq., Barrister-at-Law.

⁽²⁾ See *Regina v. Moore*, 19 Eng. Rep., 567 *contra*.

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No evidence was given by the prosecution that the prisoner had seen or heard of his wife between 1870 and the date of his second marriage.

46] * *Williams* cited *Reg. v. Turner* (9 Cox's C. C., 145), and *Reg. v. Horton* (11 Cox's C. C., 670).

Dunn, in reply: *Reg. v. Turner* has been overruled by *Reg. v. Gibbons* (12 Cox's C. Cas.), which was the joint opinion of Willes and Brett, JJ., and that supposing *Reg. v. Horton* to be correct it would only help the defence if the jury were of opinion that the prisoner honestly believed his first wife was dead, which, from the evidence as to his character, they would hardly do. He contended that such evidence could only go in mitigation of punishment.

BRAMWELL, L.J., said: And if it were necessary to decide that point, I think so too. The statute, moreover, seemed to me express, and the words are perfectly clear; and I cannot, and never do, recognize as a defence such a ruling as my Brother Martin laid down in *Reg. v. Turner*. I shall, therefore, follow *Reg. v. Gibbons*, nor will I grant a case, but will ask the jury to convict the prisoner upon the evidence before them.

This was accordingly done, and, having also been found guilty of forgery and false pretences, the prisoner was sentenced to

Ten years' penal servitude.

See *Reg. v. Moore*, 18 Cox's C. C., 544; 19 Eng. Rep., 567 (not then reported), when Denman, J., after consulting with Amphlett, L. J., followed *Reg. v. Turner*, and under the circum-

stances did not grant a case for consideration, the facts therein not meriting a severe punishment. His Lordship's judgment was not, however, to be taken as a final one.

See 1 Eng. Rep., 408 note; 4 Eng. Rep., 223 note; 12 Eng. Rep., 234 note; 15 Eng. Rep., 160 note; 12 Am. Law Rev., 469; Spooner's Trial by Jury, 178, *et seq.*

The violation of a prescribed public duty by a ministerial officer is indictable without being made so in terms by a statute. In the absence of express words in the statute, making the act criminal, the indictment must charge that the offence was committed with an evil intent, or wilfully: *State v. Startup*, 39 N. J. Law, 423.

Ignorance of the law is no excuse for a crime: *State v. Halsted*, 39 N. J. Law, 403, distinguishing *State v. Cotter*, 36 N. J. Law, 125.

In bigamy the felonious intent is not an element in the crime which may be rebutted by evidence. A person may

be guilty of the crime of bigamy who, in good faith, believed he or she had been lawfully divorced: *Davis v. Com.*, 13 Bush (Ky.), 318.

It is no excuse or justification to one who solemnizes a marriage between minors, without the consent of the parent or guardian, that the parties to the marriage informed him that they were of age; he acts at his peril, and must ascertain the facts: *Sikes v. State*, 30 Ark., 496.

By the Rev. Stat. c. 147, any person who shall unlawfully and maliciously pull down or destroy any building, bridge, or other erection, shall be guilty of felony:

Held, 1. That it was not necessary to allege in an indictment under this act for pulling down a house that it was done riotously.

2, That if the house was pulled down unlawfully and without any *bona fide* belief by the defendant that he had a right to do it, the jury might infer such malice as would support the indictment.

The act done need not proceed from personal malice towards the owner of the property; but may be inferred from the commission of wrongful acts, forbidden by law: *Queen v. Elston*, 5 Allen, New Brunswick Rep., 2.

The Michigan statute (Comp. L., § 4729) makes it a misdemeanor for one to solemnize a marriage, knowing that he is not lawfully authorized to do so, or that there is a legal impediment thereto. Held to apply to marriages not authorized by law, as where the girl is under the age of consent.

Where a justice joined in marriage a girl who professed to be of the age of consent although she was apparently not, it was held competent to show that his family and her father's were neighbors and acquaintances, and that at the marriage he did not inquire for her

parents who were not present: these facts tended to show that he knew the marriage was unlawful.

The rule requiring the prosecution to call every attainable witness where testimony is needed to disclose any part of the transaction, is to prevent the suppression of evidence, and does not make it always necessary to call all witnesses, particularly where their testimony would be only cumulative, and the offence is not a crime of violence.

Where guilty knowledge is an ingredient of the offence, there need not usually be direct proof of actual, positive knowledge, but the jury may infer it from suspicious circumstances, such as apparently intentional neglect to make inquiry before engaging in a doubtful transaction.

The fact of guilty knowledge should be left to the jury to determine, from all the circumstances: *Bouker v. People*, 37 Mich., 4.

[14 Cox's Criminal Cases, 46.]

NORTH AND SOUTH WALES CIRCUIT.

Chester Summer Assizes, 1877.

(Before Lord Justice Bramwell.)

REG. V. FREDERICK WOOD (¹).

Rape—Complaint made in the absence of the accused—Admissibility of.

Where a man is charged with committing a rape upon a female, the full particulars of the complaint she made against him to other persons in his absence some time after the alleged offence may be given in evidence.

FREDERICK WOOD, a striker, at Saltney, was indicted for rape upon Amelia Wild, at Chester, on the 4th day of March, 1877.

E. J. Dunn prosecuted; *Swetenham* defended.

Miss Wild was barmaid at the Elephant and Castle Inn, *Northgate street, Chester. On a Sunday evening, [47 when the rest of the establishment were away, she was left about six o'clock alone in charge of the house. She stated that, when there by herself, the prisoner came in through the front door, which was not locked, found her in the parlor, and then committed the offence upon her in spite of her

(¹) Reported by E. JULYAN DUNN, Esq., Barrister-at-Law.

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endeavors to prevent him. The prisoner then left the house and she at once went to the door to see for a policeman, but none was forthcoming. She stayed alone in the house till eight o'clock, about an hour and a half after the alleged rape, when a customer, Samuel Wainwright, came in, and to him she made a complaint mentioning Wood's name in connection with it.

Dunn then proposed to ask the witness what she said to Wainwright, as nearly as she could remember, and what he said in reply, citing *R. v. Eyre*, 2 F. & F., 579, and Fitzjames Stephen on Evidence, p. 146.

BRAMWELL, L.J.: I shall admit the conversation: you give evidence of a complaint being made and use the name of the prisoner, leaving it to the jury to *infer* that the girl said that he had committed the offence that we are now trying him for. I do not see why you should not give in evidence all she said when she did so complain, leaving it to the jury to judge of the value of such testimony.

The witness then stated to the court all that she had told Wainwright, how that Wood had come into the house, had committed this assault upon her by insertion of his person, &c., having first thrown her down, torn and lifted up her clothes, and that she had screamed, &c., just as she had given the details in examination in chief. She also stated what replies Wainwright had made to her story. He also was called and corroborated the prosecutrix as to the making of the complaint, saying that she told him Wood had committed an indecent assault upon her and the words of it.

Another witness, who saw Miss Wild, also in the absence of the prisoner, at 10 p.m. the same night, gave similar evidence as to receiving the same complaint, and the words of it from her about Wood. In the result, in consequence of certain other evidence (called by the defence), the verdict was

Not guilty.

3 Greenl. Ev., § 213; *People v. McGee*, 1 Den., 19; Roscoe's Crim. Ev. (7th Am. ed.), 25, 880; 2 Bish. Crim. Proc. (2d ed.), §§ 963, 972; 2 Whart. Cr. Law (7th ed.), § 1150.

The complaints of the prosecutrix, made soon after the alleged offence, are admissible, not as *confirmatory* of the truth or falsity of her evidence, but as affecting the *credibility* of her testimony: *People v. McGee*, 1 Denio, 22.

On the trial of an indictment for rape, although proof of the fact, that the prosecutrix made complaint *recently*

after the commission of the offence, is competent, yet evidence of the *particulars* of such complaint are inadmissible on behalf of the prosecution: *Baccio v. People*, 41 N. Y., 265; *State v. Niles*, 47 Verm., 82; *State v. Ivins*, 36 N. J. Law, 233; *People v. Lynch*, 29 Mich., 274; *State v. Richards*, 33 Iowa, 420; *Thompson v. State*, 38 Ind., 39, and cases cited, p. 40; *Burt v. State*, 23 Ohio St. R., 394; *Pefferling v. State*, 40 Tex., 486; *Quigly's Case*, 6 Circuit Cases (Irish), 677.

See *Thompson v. State*, 38 Ind., 40, as to the method of examination and questions which are competent: see also *Regina v. Langfield*, 56 Law Times (folio), 127.

Accordingly, where the mother of the prosecutrix was permitted to testify, in detail, on her direct examination, to the statements of the latter, made to her, of the time and manner of the commission of the offence by the prisoner: Held, error: *Baccio v. People*, 41 N. Y., 265.

It has been doubted whether even the fact of a complaint having been made three weeks after the alleged rape, is competent, in the absence of any explanation of so long a delay: *Baccio v. People*, 41 N. Y., 265.

See also *Topolanck v. State*, 40 Tex., 160.

It seems, that the evidence of the mother of the prosecutrix, that the prosecutrix stated to her, in explanation of an omission to make complaint, sooner than three weeks, of the alleged offence, that she was deterred from so doing by threats of the prisoner, is for no purpose admissible: *Baccio v. People*, 41 N. Y., 265.

Upon the trial of indictment for rape, the effect of the fact of delay on the part of the prosecutrix in making complaint of the outrage, as a circumstance tending to her discredit, depends upon the surrounding circumstances. The law requires promptness, but a failure to make an immediate complaint, may be excused or justified. It is not, as matter of law, required to be

made to the first person seen: *Higgins v. The People*, 58 N. Y., 377.

See also *State v. Niles*, 47 Verm., 82, where it was held that the lapse of time between the alleged offence and the complaint sought to be proved goes to the weight of the testimony of the complainant, and not its competency:

See *Topolanck v. State*, 40 Tex., 160.

In some of the states it is held that where recent complaints of the prosecutrix are admissible, that it may be shown she charged the crime upon the defendant: *Burt v. State*, 23 Ohio, 304.

In others the contrary is held: *Thompson v. State*, 38 Ind., 40.

Mr. Roscoe (*Roscoe's Crim. Ev.*, 7th Am. ed., 880) lays down the rule, on the authority of *Rex v. Osborn*, Carr. & Marsh., 622, that the prosecutrix may be asked whether she named a person as having committed the offence, but not whose name she mentioned.

In the trial of an indictment for rape, evidence that bruises were found upon the person of the prosecuting witness two or three weeks after the offence was alleged to have been committed, was held proper to be submitted to the jury, who should give it whatever weight they deemed it entitled to receive: *State v. McLaughlin*, 44 Iowa, 82.

In a note to *Regina v. Langfield*, 56 Law Times (folio), 127, it is said that Mr. Justice Willes had repeatedly settled the form of question to be put to the prosecutrix as follows: "Did you complain to ——— of what the prisoner had done?"

IRELAND.

[14 Cox's Criminal Cases, 48.]

COURT FOR CROWN CASES RESERVED.

Dec. 22, 1877.

(Before May, C.J., O'Brien, J., Fitzgerald, B., Fitzgerald, J., Deasy, B., and Barry, J.)

*REG. V. MICHAEL KELLEHER⁽¹⁾.

[48

Indictment—False pretences—Statements of false pretences not negatived—Effect of verdict.

Where K. was indicted in the following form, that he did falsely pretend that he the said K. was one G., who had moneys deposited in the Cork Savings Bank, and who had a book of the said bank with a statement of his account in it, which book

⁽¹⁾ Reported by CECIL R. ROCHE, Esq., Barrister-at-Law.

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he the said K. presented to the cashier of the bank at the time he represented himself to be the said G., by means of which said false pretence the said K. obtained moneys, &c., whereas in truth K. was not the person so named in the said savings bank book, nor had he any authority then or at any other time from the said G. to present the said book at the savings bank for the purpose of drawing out money, neither had he, the said K., any authority from G. to draw money from the said bank, it was held that the subsequent portion of this indictment did not negative the previous averments, and in consequence the indictment was quashed.

CASE reserved for the opinion of the court by the recorder of Cork. The prisoner, Michael Kelleher, was indicted as follows: That he "unlawfully, knowingly, and designedly did falsely pretend to one Edmond James Julian, cashier in the Cork Savings Bank, that he the said Michael Kelleher was one James Goulding, who had moneys deposited in the said savings bank, and who [blank] a book of the said bank with a statement of his account in it, which said book he, the said Michael Kelleher, presented to the said Edmond Julian at the time he represented himself to be the said James 49] Goulding, by *means of which said false pretence he, the said Michael Kelleher, did then and there unlawfully obtain from the said Edmond James Julian the sum of £10 of the moneys of the said James Goulding with intent thereby to defraud; whereas in truth and in fact the said Michael Kelleher was not the person so named in the said savings bank book, nor had he any authority then or at any other time from the said James Goulding to present the said book at the savings bank for the purpose of drawing out money, neither had he, the said Michael Kelleher, any authority from the said James Goulding to draw money from the said bank to the great damage and deception of the said [blank] to the evil example," &c. The evidence, as appeared from the report of the learned recorder, which for the purposes of the present report it is not necessary to set out at length, went to show that the prisoner obtained possession of the bank book of James Goulding who had money lodged in the Cork Savings Bank, that he passed himself off as James Goulding to the book-keeper, who gave him a ticket which he presented to Mr. Julian, the cashier of the bank, who thereupon paid him £10. The jury convicted the prisoner. Counsel for the prisoner moved in arrest of judgment, first, that the pretences were according to the evidence incorrectly stated in the indictment; secondly, that the sum of £10 was not paid by E. J. Julian because of the false pretence alleged, but because the book-keeper issued a ticket entitling the bearer to receive that sum from E. J. Julian; thirdly, that the money alleged to have been paid by the said E. J. Julian to the prisoner was not the money of James

Goulding, but was the money of the trustees of the Cork Savings Bank; fourthly, that the averment of the false pretence in the indictment is uncertain, obscure, and unintelligible; fifthly, that the indictment does not contain a special averment showing in what respect the alleged false pretence or any part thereof is false, and that the special averment in the indictment does not negative the pretence as laid. The learned recorder declined to arrest judgment, but stated a case for this court, virtually asking the court to decide on the questions above stated.

Lawrence, for the prisoner: The law on the subject of what the indictment must contain is thus laid down by Lord Ellenborough in *Rex v. Perrott* (2 M. & S., 379): "The convenience also of mankind demands, and in furtherance of that convenience, it is part of the duty of those who administer justice to require, that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are to be impeached for falsehood." The strict way in which these indictments are construed will be seen in *Reg. v. Rouse* (4 Cox's C. C., 7), and *Rex v. Hill* (R. & R., 190). The indictment here is bad, as the false pretences alleged have not been negatived. The prisoner might have had an account in the bank under the name of James *Goulding, that is perfectly consistent with the [50 indictment, and its falseness has not been alleged.

Holmes, Q.C., with him *John G. Gibson*, for the Crown: It must be remembered that this is a case after verdict. There is a sufficient false pretence stated on the face of the indictment in its first portion. The defect, if any, has been cured by verdict (*Heymann v. The Queen*, L. Rep., 8 Q. B., 102; *The Queen v. Goldsmith*, 12 Cox's C. C., 594). It is necessary to look at the entire indictment. The reason for setting out these false pretences is to enable the prisoner to raise the question on demurrer if the false pretence is insufficient in point of law. There are many statements of false pretences which do not require a subsequent denial, as if a man pretends he is another person.

The judgment of the Court was delivered by

MAY, C.J.: The court are of opinion that the indictment cannot be sustained. The indictment states that "the prisoner knowingly and designedly did falsely pretend that he the said Michael Kelleher was one James Goulding, who had moneys deposited in the Cork Savings Bank and who had a book of the said bank with a statement of his account in

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it, which said book he, the said Michael Kelleher, presented to Edward Julian, the cashier of the bank, at the time he represented himself to be the said James Goulding, by means of which said false pretence the said Michael Kelleher obtained £10 of the moneys of the said James Goulding, with intent to defraud; whereas in truth and in fact the said Michael Kelleher was not the person so named in the said savings bank book, nor had he any authority then or at any other time from the said James Goulding to present the said book at the savings bank, nor had he any authority then or at any other time from the said James Goulding to present the said book at the savings bank for the purpose of drawing out money, neither had he, the said Michael Kelleher, any authority from the said James Goulding to draw money from the said bank." There is no averment in the indictment as to the person named in the bank book. It is clearly established that an indictment for obtaining money by false pretences should state the pretence, and should negative the truth of the matter so pretended with precision, so as to inform the prisoner with certainty of the charge made against him. The indictment does not contain any allegation that the prisoner pretended he was the person named in the bank book, nor that he pretended he had authority from Goulding to present the book or to draw money from the bank; and having omitted to allege any such pretences, as having been made by the prisoner, the indictment proceeds to negative their truth. The indictment does not negative the truth of averments which the prisoner is alleged to have made, but of others which he is not alleged to have made. It has been contended that these defects were cured by the verdict. But this is not a case of matters of fact imperfectly stated, but which must have been sufficiently established in evidence in order to warrant 51] a conviction, in which *case the defect would be cured by verdict. But the matters alleged in the indictment are substantially insufficient, and if assumed to be true do not disclose a criminal offence. The court, therefore, is of opinion that the indictment cannot be sustained; and the conviction must be set aside.

Conviction quashed.

[14 Cox's Criminal Cases, 59.]

NORTH WALES CIRCUIT.

Carnarvon Spring Assizes.

(Before Mr. Justice Mellor.)

*REG. V. PETER WILLIAMS ⁽¹⁾.

[59]

Night poaching—Offensive weapons—Intention—9 Geo. 4, c. 69, s. 9.

Three men in company were seen hunting game in the night time with dogs.

It was not proved that two of the men were in any way armed. The third (the prisoner), who was lame, only carried the stick with which he usually walked.

The jury should not find the prisoner guilty unless satisfied that this walking-stick was an offensive weapon, and that the prisoner had carried it with the intention of using it as an offensive weapon should occasion arise.

THE indictment charged that Peter Williams, together with divers other persons to the number of three and more together on the 22d day of October, 1877, about the hour of eleven in the night of the same day, being then by night as aforesaid armed with bludgeons, sticks and other offensive weapons, did then together, by night as aforesaid, and armed as aforesaid, unlawfully *enter certain land* in the occupation of John Jones, situate in the township of L., in the county of Carnarvon, for the purpose therein of taking and destroying game and rabbits, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

2d count. That the said Peter Williams, with divers other persons to the number of three and more together, on the day and year aforesaid, about the hour of eleven in the night of the same day, being then by night as aforesaid respectively armed with bludgeons, sticks, and other offensive weapons, were then together by night as aforesaid, and armed as aforesaid, unlawfully *in certain land* in the occupation of the said John Jones, situate in the township aforesaid, in the county aforesaid, *for the purpose therein [60 of taking and destroying game and rabbits, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

There were also counts for resisting his lawful apprehension, and for a common assault.

Evidence was given at the trial that the prisoner, in company with two other men, was seen to come from a field in the occupation of John Jones into the road, where the game-

(¹) Reported by C. HIGGINS, Esq., Barrister-at-Law.

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keeper was watching. After crossing the road the three men with the same two dogs were seen apparently in search of game.

Two of the men escaped, but the prisoner was collared by the game-keeper and a struggle ensued in the wood. It was given in evidence by the defence that the prisoner was lame and was accustomed to walk with a stick. On the night of the alleged poaching affray, the prisoner was armed only with the stick with which he usually walked, and there was no evidence that the other men were armed at all. The game-keeper was armed with a similar walking-stick.

Ignatius Williams appeared for the prosecution; and the prisoner was defended by *Swetenham*.

It was contended for the defence that there was no evidence that would justify the jury in coming to the conclusion that the prisoner was armed with an offensive weapon, or that he took it with him for the purpose of offence.

MELLOR, J., in charging the jury, said: It is provided by the 9th section of the 9 Geo. 4, c. 69, that if any persons to the number of three or more together shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any such persons being armed with any gun, cross-bow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor. In order to bring the prisoner within this statute you must be satisfied, first, that three or more men entered upon land for the purpose of taking game. Now of course, if the keeper is to be relied upon, there can be no doubt about that in this case. He saw three persons and two dogs, and saw them beating the field just as people do who go out for the purpose of catching hares or anything else they can get. The only point made by Mr. Swetenham for the defence was this—the prisoner was not armed with any bludgeon or offensive weapon, but with a stick, which he ordinarily used in walking, and therefore we cannot assume he took that stick out on that particular night for the purpose of hunting game in these fields. You see that everything depends upon the wording of the act of Parliament. Suppose the men had nothing but nets with them, that would not be within the statute. There is the stick before you, judge for yourselves, for there is no doubt that it is the stick of the prisoner. With regard to the statute, it seems to have been the 61] opinion—a rather varying opinion—of the judges, *that it may be a question for the jury whether or not they think the stick is of a character to be called a bludgeon, or an

offensive weapon in the nature of a bludgeon, so that it is carried for the purpose of assisting in the poaching, or, if occasion arises, of resisting a lawful apprehension. If you think the prisoner was using this stick and intended it, not for the mere purpose of assisting him in walking, but took it for the purpose of assisting in the infraction of the game laws, then he will have to be found guilty. On the other hand, if you think he only used it as a walking-stick and had no intention to use it for offensive purposes, you ought to acquit him. Referring to the count for common assault, his Lordship said—If you think the man used more violence than was necessary to free himself from being laid hold of by the collar, you must find him guilty; but if only force enough to prevent himself from being collared and taken by the game-keeper, he must be acquitted.

The jury found the prisoner not guilty.

C A S E S
DETERMINED BY THE
COMMON PLEAS DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE COMMON PLEAS DIVISION,
X L V I C T O R I A.

[2 Common Pleas Division, 125.]

Feb. 16, 1877.

[IN THE COURT OF APPEAL.]

125] *JACKSON V. THE METROPOLITAN RAILWAY
COMPANY⁽¹⁾.

Negligence—Evidence—Accident—Railway—Disorderly Persons—Order.

The plaintiff was a passenger by the defendants' railway, and at one station, though all the seats in the carriage in which the plaintiff was were filled, three more persons got in and stood up. There was no evidence that the defendants' servants were aware of this, but the plaintiff remonstrated with the persons who had so got in. At the next station, the door of the carriage was opened by persons who tried to get in, and the plaintiff rose and held up his hand to prevent them. After the train had started, a porter pushed away the persons who were trying to get in and slammed the door, which caught and injured the hand of the plaintiff, who had been thrown forward by the motion of the train :

Held, by Cockburn, C.J., and Amphlett, J.A. (Kelly, C.B., and Bramwell, J.A., dissenting), affirming the decision of the Court of Common Pleas, that there was evidence from which the jury might infer negligence on the part of the defendants so as to entitle the plaintiff to recover damages.

THE plaintiff had brought an action against the defendants to recover damages for an injury done to his hand by the negligence of the defendants' servants, and at the trial he obtained a verdict.

⁽¹⁾ Affirming 11 Eng. Rep., 244.

The defendants, pursuant to leave reserved, moved for and obtained a rule *nisi* to enter a nonsuit or a verdict for the defendants, which was, after argument, discharged by the Court of Common Pleas (*).

Notice of appeal to the Exchequer Chamber was given by the defendants, according to the Common Law Procedure Act, 1854, and the following are the facts as stated in the case on appeal.

1. The plaintiff, upon the 18th of July, 1872, about 8 p.m., took a third class ticket from Moorgate Street to Westbourne Park, and entered a third class carriage upon the defendants' railway. 2. The compartment in which the plaintiff travelled was gradually filled up as the train proceeded, and when it left the King's Cross Station all the seats were occupied. At Gower Street Station three more persons got in, and they were obliged to stand up. 3. There was no evidence to show that the attention of the company's servants was drawn to the fact of the extra number being in the compartment, but there was evidence that the plaintiff *remonstrated at their getting in with the persons so [126 getting in, and it was stated by a witness named Underwood, who travelled in the same compartment, that he did not see a guard or porter at Gower Street. 4. At Portland Road, the next station, the three extra passengers still remained standing up in the compartment. The door of the compartment was opened and then shut, but there was no evidence to show by whom either of these acts was done. 5. Just after the train had started there was a rush, and the door of the compartment in which the plaintiff was seated was opened a second time by persons trying to get in. 6. The plaintiff, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. 7. After the train had started, a porter pushed away the people who were trying to get in, and slammed the door to just as the train was entering the tunnel. At the same moment the plaintiff, by the motion of the train, fell forward and put his hand upon one of the hinges of the carriage door to save himself; and at this moment, by the door being slammed to, the plaintiff's thumb was caught and injured.

The question for the decision of the Court of Appeal was, whether there was any evidence of negligence on the part of defendants' company to entitle the plaintiff to recover.

(*) Law Rep., 10 C. P., 49; 11 Eng. Rep., 244.

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Dec. 13, 1876. *McIntyre*, Q.C., and *Kemp*, for the defendants: This accident happened, in fact, because the porter did his duty, and if the plaintiff had kept his seat it would not have happened. No one was at that time trying to get into the carriage, and the presence of the three extra passengers had nothing to do with it. The company ought not to be made liable for an accident caused, if it was so caused, by the acts of disorderly persons.

[COCKBURN, C.J.: If there had been any one in authority present, the disorder would probably have been prevented.]

Macrae Moir, and *Glyn*, for the plaintiff: The question is not whether the jury were right, but whether there was evidence to go to them: *Bridges v. North London Ry. Co.* ⁽¹⁾; *Robson v. North Eastern Ry. Co.* ⁽²⁾; *Rose v. North 127 Eastern Ry. Co.* ⁽³⁾ It is clear *that there was a crowd, and the porter ought to have been more careful in shutting the door.

McIntyre, Q.C., in reply: From the nature of the traffic on the Metropolitan Railway, it must be conducted quickly, and it would be impossible to inspect every carriage at every station. Nothing stated amounts to negligence on the part of the defendants.

Cur. adv. vult.

Feb. 16, 1877. The following judgments were delivered ⁽⁴⁾:

AMPHLETT, J.A.: The question we have to determine is, whether there was evidence before the jury from which they might reasonably infer that negligence on the part of the company caused or contributed to the injury for which the plaintiff seeks compensation. In considering this question, we must bear in mind that it is now settled by the case of *Bridges v. North London Ry. Co.* ⁽¹⁾ (though previously doubted by many eminent judges) that the question whether in cases of this sort negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the court or the presiding judge.

The facts in the present instance were, in contemplation of an appeal to the Exchequer Chamber, embodied in the case before us, and it was contended before us by the counsel for the company that we could not, any more than the Exchequer Chamber under the old practice could, look at anything beyond the case. We felt obliged to yield assent

⁽¹⁾ Law Rep., 7 H. L., 213.

⁽²⁾ 2 Q. B. D., 85.

⁽³⁾ 2 Ex. D., 248.

⁽⁴⁾ These judgments were read by Baggallay, J.A.

to that contention, though, speaking for myself, with regret, because I have found it rather embarrassing to review the decision of the learned judges in the court below in a case of this sort, when they had the advantage, which we have not, of seeing the evidence *in extenso*.

Confining myself, however, strictly to the statements in the case, I am of opinion that the first four paragraphs do not disclose any evidence of negligence on the part of the company. They would have done so if the three extra passengers had entered or continued in the plaintiff's compartment with the knowledge of any of the officers of the company, but it is expressly found that there was no evidence to show that the attention of the company's *servants [128 was drawn to the fact; and I myself do not think that there was any negligence in the servants not discovering it for themselves, in the absence of any complaint or remonstrance from the passengers aggrieved; for I think it would be unreasonable to expect that every compartment in a long train should be visited at each station to see whether it was overcrowded. I think, therefore, that the presence of these three extra persons in the plaintiff's compartment was immaterial for the purposes of this inquiry, except so far as it would aggravate the inconvenience, and, possibly, injury, which would have resulted to the plaintiff, if still more passengers had got into the compartment at the Portland Road Station, and consequently tend to justify him, if any justification were wanted, in taking energetic measures to prevent it. I need not, however, dwell upon this, because it was not argued before us, nor, I believe, in the court below, that there was any contributory negligence on the part of the plaintiff.

It remains to be considered whether there was any evidence of negligence on the part of the company with respect to the subsequent events at the Portland Road Station. They were as follows: Just after the train had started from that station there was a rush, and the door of the plaintiff's compartment (which had been before opened and then shut by some unknown persons at the station) was opened a second time by persons trying to get in. This was obviously a gross invasion of the plaintiff's rights as a passenger, and fully justified him in rising, as he did, partly from his seat and holding up his hand to prevent any more passengers from coming in. After the train had started, a porter pushed away the people who were trying to get in, and slammed the door to, just as the train was entering the tunnel, which I understood was close to one end of the plat-

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form. This was, of course, after the door had been opened a second time; how long after is not stated in the case, but I think it may be presumed that the interval was somewhere about the time that the train took to pass from the place where it was stationary to the end of the platform next to the tunnel. What that distance was is not stated in the case, but it may obviously have been nearly the whole length of the platform, which seems to have been the view of my Brother Grove, according to the note of his judgment. 129] *Now, the slamming the door to by their porter—who, it may be observed in passing, is the only officer of the company on the platform of whom any mention is made in the case—was very probably the most prudent thing he could do for the safety of the passengers; but unfortunately at the same moment the plaintiff, by the motion of the carriage, fell forward, and, putting his hand upon one of the hinges of the door to save himself, received by the slamming of the door the injury complained of.

This being the history of the accident, there are two principal acts of negligence imputed to the company or their servants. First, it is said that although the slamming to of the door may have been proper and even necessary in itself, yet that, under the circumstances, since the porter from his position must have seen that the compartment was unusually crowded, he ought to have given some special warning before he slammed the door, and that the omission to do so was negligence. Without myself expressing any opinion upon this, I think it was eminently a proper question to be left to the jury. Secondly, it was said that even if there was no negligence in the slamming the door, which was the immediate cause of the accident, there was negligence on the part of the company in not preventing the “rush” of people on the platform, who opened the door for the purpose of illegally forcing an entrance into the compartment. I think this also was a proper question to be submitted to a jury, for I take it to be clear that it was the duty of the company to provide such a staff of officers on their platforms as, upon ordinary occasions, and when there was no sudden and unforeseen influx of people, would secure their passengers from such an outrage as has been described. There was no evidence that on this occasion there was any unusual number of passengers or others on the platform, or that there were any extraordinary circumstances which made it unreasonable to expect that the company should be able by its ordinary staff, however efficient, to control the movements of the people, and I think, therefore, that a jury might rea-

sonably come to the conclusion that the state of things was on the evening in question normal and ordinary, and that it was the deficiency of the staff which made the commission of the outrage possible, and thus caused or contributed to the accident. It was said, indeed, that as the plaintiff *must make out his case, he ought to have given [130 some evidence to negative the existence of any such extraordinary circumstances as might have excused the company. I do not agree with that proposition. The real state of things on the platform could only be proved by calling some of the officers of the company, which it would be unreasonable to expect the plaintiff to do.

Upon the whole, I am of opinion that the case was properly left to the jury, and as the presiding judge is not dissatisfied with the verdict, I agree with the decision of the court below that it ought not to be disturbed.

BRAMWELL, J.A.: I am of opinion that this judgment should be reversed; that there is no evidence of any negligence in the defendants or their servants, and that the supposed or surmised or inferred negligence did not cause the damage of which the plaintiff complains.

It is contended that *Bridges v. North London Ry. Co.* ⁽¹⁾ shows that such cases as the present ought to be left to the jury. This would be so, if that case established that all complaints arising out of accidents in or on a railway ought to be so left. It has established nothing so absurd. It does not show that if a man dies in a fit in a railway carriage there is a *prima facie* case for his widow and children, nor that if he has a glass in his pocket and sits on it and hurts himself, there is something which calls for an answer or explanation from the company. But as it does not establish this, it furnishes no guide in these cases. For I agree with the Chief Baron (who has favored me with his judgment) that it lays down no principle. Lord Cairns says: "I trust the case may be found useful in future as negating the idea that under circumstances such as I have described a case is to be withdrawn from the jury." ⁽²⁾ Lord Hatherley says: "In this state of circumstances I think it would be very strong to say there was not evidence to go to the jury in this case." ⁽³⁾ I sincerely wish this case was governed by that, so that I might be spared the irksome and profitless task I have now before me. No doubt it is a guide in some, but cannot help us in all cases. I may observe, moreover, *that the arguments in favor of the defen- [131

⁽¹⁾ Law Rep., 7 H. L., 213.

⁽²⁾ Law Rep., 7 H. L., at p. 240.

⁽³⁾ Law Rep., 7 H. L., at p. 242..

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dants are not noticed in the judgments, possibly because though they satisfied seven judges, they are not worthy of notice; also, that it is somewhat remarkable by what different roads the same conclusion in favor of the plaintiff was arrived at.

Deriving, then, no assistance from that case, I must proceed humbly by my own unaided faculties to examine the present case. It is impossible, as I have said, that wherever a passenger meets with an accident in a railway carriage the case must be left to the jury to find negligence or not. Sometimes it must be the duty of the judge to tell the jury they cannot find for the plaintiff, and sometimes to tell them that they must do so if they believed the witnesses. Suppose an expert is called, who proves that the accident arose from an axle breaking, and that it broke from a defect in the casting against which no skill in the manufacturer could guard, and which no care in the railway people could detect. Surely the judge must say there is no evidence of negligence or wrongful conduct in the railway company. On the other hand, if the expert proves that the defect was from careless casting, and that ordinary care in the railway people would have detected it, the judge must not leave that to the jury as a question for them, but tell them they are bound to find for the plaintiff, if they believe the witnesses. So in cases not requiring scientific knowledge, but depending on common knowledge and common sense, the principle is the same. Suppose it is proved that, an express train being due, the station master had a carriage shunted, trusting that the train might be a minute late. In such a case the jury ought to be told that negligence or misconduct is proved, and they must find for the plaintiff. On the other hand, suppose the accident was caused by a person maliciously dropping from a bridge over which there was a public footway, a piece of iron on the rails; equally in that case the jury ought to be directed to find for the defendants. I have hitherto supposed cases where the thing itself is proved which causes the damage, and which is or is not negligence or a wrongful act in the company. But there are other cases where the negligence is not proved or attempted to be proved directly, but where evidence is given from which it may be inferred. That was the case in *Bridges v. North London Ry. Co.* (1). There the negligence of the driver, as some thought, was inferred from his not drawing up at the proper place. There was no evidence that he was not attending to his engine, that he was drunk, or was reading or

(1) Law Rep., 7 H. L., 213.

looking at something as he passed, or was inattentive from some other cause or indifference; the evidence was of that nature from which such a cause might be inferred. In like manner it was inferred that it was from negligence that the porters called out the name of the station, and then allowed some time to elapse before they called out "Keep your seats." It was not shown or proved that they were inattentive. But the principle is the same. If what is to be inferred is what is proved from the facts proved, the judge may say so. This is a case of that description. It was not proved that the train was too short or too long, the passengers too few or too many, the porters too few or too numerous, too inattentive or too attentive and eager in slamming the doors. All that is said is that there must have been or perhaps was some thing or things wrong. Now let us see what. The train may have been too small so that there was no room for the three intruders; or too large, so that the three had not time to get beyond the first third class carriage. Or it may have started too soon, giving not time enough to get in; or too late, and so people got out of the carriages, and had not time to get in again. Or there may have been too few porters to prevent what happened, or too many, and so they got in each other's way. In short, as the thing did not necessarily happen, it was preventible, and as the defendants did not prevent it they caused and permitted it. But it does not follow that they are guilty of negligence. No doubt by doubling the number of carriages, by letting passengers go on to the platform one by one, by stopping at each station five minutes, by having a porter for every carriage or two or ten porters for every carriage, it would be possible to prevent persons getting into the carriages where there were no seats for them. But with precautions to insure this, and to make it absolutely certain, the traffic must stop. It would not pay the defendants to carry it on, nor be worth while for the public to make use of it. All that the public has a right to expect, all that the defendants undertake for, is that which is consistent *with prac- [133 tically working the railway. Does the intrusion of three men in a carriage already full afford any evidence that there is any failure of what is practically possible in the management of the railway? I say, no—I do not believe that any one in his conscience would say that he would censure or reprimand either the directors or manager of the company, or the porters at a particular station, on its being proved that three persons at that station had got into a carriage already full. How is it to be avoided? How can the porters

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see that a carriage into which people are getting is full? It would be very desirable that the jury at least should be put to do the porters' work for a week. But further, assume there was negligence, or something wrong shown by the fact that these men got in. I say the plaintiff has no right to complain of it. Because, had they got out again, it could not have been suggested, at least I suppose not, but perhaps it might, that their getting in had anything to do with the accident. But the plaintiff suffered them to be there without complaint. He probably found, as is often the case, that their presence was not inconvenient, and was not churlish enough to try and get them turned out. Now, as to the other negligence. Somebody opened the door and shut it, and some others made a rush at the door and opened it, but were pushed away by the porter. These things are not negligence in the defendants' servants, but are, it is said, evidence of it. That is to say, they show that the train was not large enough, and did not stop long enough, and that there were not porters enough to prevent what happened. I shall not repeat what I have said on this point. Then the porter "slammed" the door. That is to say, he shut it very quickly. What was the man to do? It had been improperly opened. Was he to leave it open, or hang on and be taken through the tunnel outside, leaving his post? I am of opinion that there is no evidence of any negligence or improper conduct—no evidence of anything censurable or blamable—no evidence of anything that care and diligence could practically prevent—no evidence of any want of what the defendants undertake for and hold out to their customers—no evidence which would be allowed to make anybody or person liable, but a railway, or perhaps a tramway, or may be a steamboat company. And I [34] *suppose it will hardly be said to be law that there is a special railway negligence. Supposing the evidence to be consistent with negligence, i.e., that negligence may have caused the matters, it is equally consistent with no negligence, i.e., that the matters proved may have been caused otherwise than by negligence, and it is an elementary rule that where the evidence is consistent as much with one state of facts as with another it proves neither.

As to the other question. Did these matters, or any of them, cause the accident? Let us examine the train of causation: 1. Negligence caused or allowed the intrusion of the three and their continuance in the carriage. 2. That caused an uneasy feeling in the plaintiff, making him more disposed to resist a further intrusion than he otherwise would

have been. Now we begin a fresh train of causation—call it 1a. Negligence caused or allowed the people at Portland Road Station to open the door and to rush. Now the two causes combine. 3. This rushing, and the uneasy feeling so created, caused the plaintiff to rise to resist the coming in of the rushers. 4. His rising, coupled with the motion of the carriage, caused him to lose his balance. 5. That caused him to put his hand out to save himself. 6. That, and the slamming of the door, caused his thumb to be hurt. Mr. Justice Grove says it is not easy to lay down a rule in such a matter; but does any rule, any definition ever yet attempted, include such a case? Is what happened in any sense the natural consequence of its alleged cause? Was it *causa proxima* or *remotissima*? Suppose the plaintiff had fallen on an open knife held by a passenger opposite, and been killed, would that have been caused by the defendants, and so a *prima facie* case of manslaughter? Suppose the plaintiff sued the rushers, and said, "You caused my thumb to be pinched." I do not say such an action would not be maintainable; but could he prove such causing?

I am of opinion that this appeal should be allowed. The plaintiff might as well rely on a crowding when he was a passenger a month before, and say that a then crowding caused an uneasy feeling which made him get up to resist the rushers. Or if crowded in railway A, and hurt by rushers in railway B, he might say that A caused it. As to the judgments of the court below, I say it with all respect, I rely on them. It is impossible that *those who [135 delivered them could have delivered such judgments had the case been well-founded. It is manifest to me that they considered that *Bridges' Case* ⁽¹⁾ set them the task of finding an excuse for a foolish and unjust verdict. That task, of course, they performed with the greatest ability, but very differently to what it would have been done had they thought their duty was to find reasons the other way.

KELLY, C.B.: I confine myself, as I conceive I am bound to do, to the printed case before us, upon which the question arises, whether there was any evidence of negligence by the company to go to the jury, and if so, whether the injury sustained by the plaintiff was caused by such negligence. It is necessary to consider the facts of the case in the order of time in which they occurred. And, first, the plaintiff being a third class passenger from Moorgate Street to Westbourne Park; and having arrived at the Gower Street Station, and all the seats in his compartment being

(1) Law Rep., 7 H. L., 213.

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filled, "three more persons got in, and they were obliged to stand up." "There was no evidence to show that the attention of the company's servants was drawn to the fact of the extra number being in the compartment." This fact appears to me to be of itself no evidence of negligence. If the intruders entered the carriage unseen and unknown to the company's servants, their act can be no evidence of negligence on the part of the company, unless it were also proved that the number of company's servants upon the platform was insufficient, or that something else occurred which made it negligence in the company's servants that these three persons entered the carriage. And if any such fact existed it was incumbent upon the plaintiff to prove it, as the plaintiff is bound to make out his case, and to adduce evidence of any fact which would render another fact, not evidence in itself, when the two facts are taken together, some evidence of negligence for a jury.

It was well observed by the Lord Chief Justice during the argument, that although it would be difficult for any of the company's servants to prevent by force three men from entering a compartment, yet if a policeman or one in authority [36] had requested them *to desist, he would probably have been obeyed. But there was no evidence, and, indeed, the contrary is found upon the case, that either the company's servants or any one else noticed the entry of the three men into the carriage; and, as before observed, there was no evidence of insufficiency in the number of servants in attendance.

The next fact is, that upon the arrival of the train at Portland Road, the next station, the door of the compartment was opened and then shut, but with no evidence to show by whom either act was done. This is clearly no evidence of anything done or omitted to be done by the company, and was probably the act of some one who wished to enter the compartment, but finding it full shut the door and went elsewhere. But "just after the train had started there was a rush, and the door of the compartment in which the plaintiff was seated was opened a second time by persons trying to get in." This fact is contended to be evidence of negligence on the part of the company, but upon the assumption, which is entirely unsupported by the printed case, that the "rush" was made by a multitude of persons, who had come upon the platform, and whom the company ought not to have permitted to assemble there in such numbers: and so that they were guilty of negligence. But there is no evidence at all that there were any greater num-

ber of persons upon the platform than those who attempted to enter the compartment, and this cannot have exceeded two or three in number, because they were effectually prevented from entering the compartment by a single porter, who pushed them away and then closed the door. Thus far, then, I see no evidence at all of any negligence either by act or omission on the part of the company or their servants. But we now come to the act of the plaintiff himself, and to the evidence touching the inflicting of the injury of which he complains. And the evidence stands thus: Just after the train had started, and when the "rush" was made, the door was opened by the persons who tried to get in. Then the plaintiff, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. At the same moment the plaintiff, by the motion of the train, fell forward, and to save himself placed his hand upon one of the hinges, and his thumb was caught and injured upon the slamming of the door by the porter. Now, here the rising from his seat *when the [137 train was in motion, and the putting of his hand upon one of the hinges, were the acts of the plaintiff, and of the plaintiff alone; and not only were these acts of the plaintiff himself no evidence against the company, but they might, if it were necessary to raise such a question, be evidence of contributory negligence by the plaintiff himself. And the only act done by the company or their servants, which in any way conduced to the inflicting of the injury, was the slamming of the door by the porter. Now, is the slamming by the porter of the door which had been opened by some wrongdoer while the train was in motion, and when it was about to enter a tunnel, any evidence of negligence against him or the company? It is not pretended that he knew, or had any reason to suspect, that plaintiff's thumb was between the door and the body of the carriage; and I am, therefore, clearly of opinion that not only is it no evidence of negligence, but that he would have been guilty of negligence if he had acted otherwise, and omitted or failed to have shut a door which had been improperly opened while the train was in motion: especially when the train was about to enter a tunnel, where, if any one had fallen out in consequence of the door being left open, the company would have been justly charged with negligence by reason of the porter, their servant, having failed to shut the door. When, therefore, we consider attentively the several facts stated in the printed case as they occurred in succession down to the infliction of the injury, no one of them appears, nor do the

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whole of them taken together appear, to affect the company with negligence; but, on the contrary, the only act done throughout by any servant of the company was the shutting of the door when the train was about to enter the tunnel—an act which it was clearly the duty of the porter to do.

It may be added that, even if it be possible to impute negligence to the company in all or any of the acts enumerated, it seems to me impossible to contend with effect that any one or all of those acts taken together was or were the cause of the injury sustained by the plaintiff. The injury was clearly caused solely by the act of the plaintiff himself, in imprudently rising while the train was in motion and attempting to prevent the entry of the intruders; and all that conduced to it on the part of the company was the act [38] *of the porter in closing the door—an act which, as I have observed, appears to me to have been incontestably his duty to do.

The case of *Bridges v. North London Ry. Co.* (1) in which no principle whatever affecting cases of negligence in general was laid down either in the Exchequer Chamber or in the House of Lords, and which turned altogether upon a number of totally different facts, seems to me to have no application to the present case. There the company had left a large and hard heap of rubbish in a dark tunnel, upon a spot at which the person who was mortally injured had alighted, and inasmuch as it was known to the company that (the train in question being much longer than the platform) some of the carriages must be left behind within the tunnel, I cannot conceive how the company could escape the charge of negligence, unless they had provided some means by which the passengers in the two carriages left in the tunnel might have alighted in safety; or unless they had given some warning to them not to alight at all, but to keep their seats. On the contrary, however, the evidence was clear and positive that when the train stopped the cry was heard upon the platform “Highbury!” by which a passenger in another compartment within the tunnel was induced to alight, and by which it can scarcely be doubted that the sufferer in the other carriage was also induced to alight; and it was not until after both must have alighted, and the person injured had alighted against or upon the heap of rubbish by which his death was occasioned, that the second cry was heard, “Keep your seats!” Neither this case nor any other case that I am aware of at all resembles that which is now before the court; and, upon these grounds, I

(1) Law Rep., 7 H. L., 213.

am of opinion that the judgment of the Court of Common Pleas should be reversed, and that a nonsuit should be entered.

COCKBURN, C.J.: I am of opinion that the judgment of the Court of Common Pleas in this case should be upheld, and this appeal dismissed.

The only question for our decision is that on which leave to move was reserved at the trial, namely, whether there was any evidence of negligence to go to the jury. In the court below there *was the further question on the [139 rule *nisi*, whether the verdict was or was not against the weight of evidence; and the decision was in favor of the plaintiff. But with this part of the case we have no concern beyond this, that if the evidence is sufficient to support the verdict, *à fortiori* it must have been such as should be submitted to the jury. The two questions however must not be confounded. Even if we should be led to think that the verdict should have been for the defendants, we must not allow that opinion to sway our judgment on the only question submitted to us, namely, whether there was any evidence to be left to the jury. And there is the greater reason for saying so since the law on this subject was finally settled by the judgment of the House of Lords in the case of *Bridges v. North London Ry. Co.* (¹). Prior to this decision, judges were sometimes in the habit of dealing with the question of negligence as one in which it was competent to the judge at the trial, and therefore to the court in banc, to determine whether the facts proved constituted negligence or not. The decision of the House of Lords has placed the matter on what I cannot but think is the right footing. The question of negligence is one, not of law but of fact, and, like every other question of fact, is for the jury and not for the judge. Not that the proper functions of the judge are at all infringed on by the decision just referred to. It still remains with the judge on this, as on any other issue of fact, to determine whether there is evidence to go to the jury. It is still the province of the court in banc to determine, on motion for a new trial, whether the verdict is according to the weight of the evidence, and if it be not, to order a new trial and submit the question to another jury. But this is the only course open. The question of negligence, if there be any evidence to be submitted to the jury, is for the jury alone, and must be decided by the jury as a question of fact. Judges must therefore now be careful both in deciding whether there is evidence to be left to

(¹) Law Rep., 7 H. L., 218.

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the jury, and whether the verdict is in accordance with the evidence; as also that in so deciding they do not permit their individual views on the subject of negligence to control or supersede the decision of the jury, on a matter which it is exclusively the province of the jury to determine as a question of fact.

As set forth in the statement of the case before us, the [140] facts are *these: The plaintiff was a passenger by a train of the defendants, which was proceeding to the westward. On the arrival of the train at the Gower Street Station three persons forced their way into the compartment in which the plaintiff was riding, and which was already full. The intruders had therefore to stand upright in the carriage as the train went on, which of course they could not do without occasioning discomfort and annoyance to the other passengers. On the train arriving at the Portland Road Station (the next in order), not only were these supernumerary passengers not removed, but just as the train was starting several other persons made a rush towards the carriage, opened the door, and tried to get in. The plaintiff then partly rose from his seat, and holding up his hand endeavored to prevent them. In this state of things a porter came up, pushed away the people who were trying to get into the carriage, and slammed to the door. At this moment the onward movement of the train caused the plaintiff, who was partly standing, to fall forward, when, to save himself from falling, he put his hand upon one of the hinges of the door. This happening at the moment when the porter slammed the door, the plaintiff's thumb was caught in the door and severely injured.

In dealing with the facts, on reviewing the judgments delivered in the Court of Common Pleas, I find myself somewhat hampered by the circumstance that that court, in forming its judgment, appears to have had facts before it which are not before us. In that court the knowledge of the facts was derived from the judge's notes of the evidence, whereas, in conformity with the procedure which existed at the time when this appeal was entered, we are confined to the case stated by the learned judge who tried the cause. On reading the judgments delivered in the court below, I find the judges, and among them Mr. Justice Brett himself, by whom the case before us has been stated, adverting to facts which appear to me very material, but which are not mentioned in the case as stated. There the presence of a crowd on the platform at the Portland Road Station, and the inadequacy of the staff to maintain order, are dwelt upon by the judges,

but are omitted in the case as stated. Nevertheless it seems to me that enough is stated to warrant the conclusion that a case was made out by the plaintiff, which he was entitled to have submitted to the jury. Moreover, I am led to think that the facts, the omission of which *I regret, may [14] be gathered inferentially from those expressly stated in the case itself.

In dealing with the facts, I must begin by saying that, in my opinion, the intrusion of the three unauthorized persons into the compartment at the Gower Street Station affords *prima facie* evidence of negligence on the part of the company's servants. I take it to be part of the duty of a railway company which invites persons to resort to its stations and to travel by its trains (*inter alia*) to provide two things: first, sufficient accommodation to meet the ordinary requirements of the traffic; secondly, a sufficient staff to maintain order and prevent irregularity and confusion, and to protect passengers from annoyance, inconvenience, or injury from travellers who set not only the regulations of the company but also decency and order at defiance. But the intrusion of persons into a carriage already full implies the absence both of carriage accommodation and of a sufficient number of officers to maintain order, or, what comes to the same thing, a neglect of their duty in this respect. Such an occurrence as that of persons forcing their way into a compartment already full, and travelling standing, to the unavoidable discomfort and inconvenience of the rest of the passengers, does not, so far as my experience goes, occur on well conducted lines of railway. It cannot be doubted that if such a thing were of frequent occurrence it would give rise to loud expostulation and complaint; and if an injury were to arise from an instance of it on a line on which it was of frequent occurrence, a company would be deemed guilty of neglect of duty for leaving such a state of things to exist. But that which would undoubtedly be reprehensible as a general practice should be prevented in the particular instance, if this can be done by reasonable care. It appears to me, subject to an observation I shall have to make presently, that the suffering three persons to make their way into a carriage in which there was no room, and allowing the train to proceed while such was the case, affords, to say the least of it, *prima facie* evidence of negligence which calls for an answer. Nor, as I shall explain presently, does their negligence, inasmuch as it has, I think, contributed to the accident, appear to me to be too remote to make the company liable.

But the negligence becomes more aggravated, as also more [42] *immediately proximate, as we advance. The train arrives at the Portland Road Station, the three supernumerary passengers still remaining standing upright in the compartment, and with things in this condition it is again allowed to proceed on its way, leaving the plaintiff and his fellow travellers subject to a continuance of the discomfort and annoyance which the presence of persons standing upright in the carriage would necessarily occasion. This fact seems to me to imply the absence of such a superintendence and supervision of the carriages composing the train as a railway company is, in my opinion, bound to exercise. Moreover, the discomfort and inconvenience to which the plaintiff and his fellow travellers were exposed was such as no one would submit to longer than he could help; and the fact that the train was dispatched before any complaint was made leads to the inference either that the train was sent on with undue haste, as well as without attention being directed to see that all was in order, or that there was no official on the platform to whom complaint might be addressed. We now arrive at the climax. As the train is just getting into motion several persons run after it, and having opened the door of the compartment in which the plaintiff was, endeavored to scramble in. The plaintiff thinking, as well he might, that the presence of any more supernumeraries would be an intolerable nuisance, rises to prevent their entrance. He falls forward, just as the porter, having pushed aside the intruders, closed the door in haste, and so the accident happens. From these facts, as it seems to me, two or three inferences may be drawn. In the first place, I infer from the rash effort of the people to get into the train when in motion that there was here again an absence of sufficient carriage accommodation, or that more tickets had been issued than an ordinary train could accommodate, in which case there would most likely be an accumulation of persons on the platform, and some confusion and disorder among them. The rush of the persons after the train, and the pursuit of them by the porter, seem to point to riotous and disorderly conduct, and to the absence of a sufficient force to maintain order and to protect persons on the platform or in the train from annoyance or injury. A jury might, I think, fairly infer that the arrangements of the company were defective: [43] that either they had failed to provide *accommodation to the extent which the traffic might reasonably be expected to require, or had inconsiderately issued a larger number of tickets than was consistent with the accommoda-

tion provided, and hence had led to an accumulation of persons on the platform larger than their staff was competent to keep in order; or, as only a single porter appears to have been seen, the jury might have considered the staff insufficient even for ordinary purposes, and, ascribing the accident to the insufficiency of force to prevent those persons from their attempt to get into the train, might have considered this insufficiency as the proximate cause of the accident which ensued.

I am far from saying that the inferences to be drawn from these facts might not have been rebutted. It may have been that the accommodation afforded may not have been inadequate to the ordinary and average requirements of the traffic. It may have been that the number of persons to be conveyed and the crowd accumulated on the platform may have been due to exceptional and unforeseen circumstances. It may have been that the supernumerary passengers eluded the vigilance of the company's servants at the Gower Street Station, or made their way into the carriage when the train was in motion and when it was too late to stop them. It may have been that the undue accumulation of persons on the platform at the Portland Road Station arose from the number of persons holding return tickets, and that, though the ordinary staff was sufficient for the ordinary traffic, it was insufficient to cope with the exceptional circumstances which presented themselves on this occasion. But the question is, whether it was not for the defendants to show any such unusual and exceptional state of things. No explanatory evidence was adduced on their part to rebut the presumption arising from the facts proved by the plaintiff; and, in the entire absence of any such evidence, it seems to me impossible to say that the admitted facts were not such as that from them the jury might infer, though, of course, it was open to them to take the opposite view, that there had been negligence on the part of the company's servants. In the absence of any rebutting or explanatory evidence, I cannot think it is open to us to speculate on possible circumstances which might thus have afforded an answer to the plaintiff's *case, or which, as matter of speculative possibility, it [144 was open to the jury, even in the absence of such evidence, to take into account. In the absence of all explanation on the part of the defendants, I am decidedly of opinion that it would not have been consistent with the duty of the judge to withdraw the question of negligence from the jury. Whether the negligence, of which *prima facie* evidence was thus given, can be deemed to have led to the accident for

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which it is sought to make the company responsible, is a different matter, which remains to be considered.

But I must advert to a strange argument which was urged upon us on behalf of the defendants. It was said that this was a line of railway the business of which was carried on upon peculiar and exceptional principles, and on which, in the interest of those usually travelling on it, dispatch and the saving of time were the paramount and sole consideration, to which comfort, and even safety, were to be made subordinate, and that hence it was impossible, as those using the line must be aware, to exercise the superintendence and control which could be exercised on other lines of railway. Of all this no evidence was given, but it was alleged to be matter of notoriety. Assuming it to be so, more than one answer can, as it seems to me, be given to the argument. In the first place, any such departure from the principles on which all well conducted lines of railway are managed is not to be presumed to be known to, or acquiesced in by, the individual passenger who complains of an injury through negligence. To make good such a defence it must be shown that he was aware of, and acquiesced in, so exceptional a mode of conducting the traffic of the line, which perhaps might be inferred from his frequently having travelled by it. In the second place, it may be answered that if the company so regulate the movement of their trains as to allow, at each station at which their trains stop, no more than sufficient time to enable one set of passengers to scramble out of, and another set of passengers to scramble into, the carriages as best they may, it behoves them to have an additional number of servants to superintend the carriages, and see to the safety and accommodation of the persons travelling by the train. But the final and conclusive answer is, that if the system thus pursued affords any excuse for so striking a departure from the safer rules on which all other [45] railways are conducted, this was *matter for the consideration of the jury. It was either submitted to them or it was not. If it was, it was for the jury to judge of its effect, and we are not called upon to decide on the propriety of their verdict. If it was not, still less should we be warranted in giving effect to it, our sole province being to say whether there was evidence to be left to the jury, not to take into account what might have been said in answer, but was not.

All that remains is to consider whether it was reasonably competent to the jury, if they thought that negligence was proved, to connect the accident to the plaintiff with that neg-

ligence as its cause, or as materially contributing thereto. I cannot doubt, especially after the decision of the House of Lords in *Bridges v. North London Ry. Co.* (1), that this was a matter of which the jury were the proper judges, and which it was incumbent on the presiding judge to leave to their decision. The continued presence of the supernumerary passengers, which in the absence of explanation might well be attributed to negligence, probably led to the resistance of the plaintiff to the intrusion of others which he might otherwise have tolerated without resistance, as he did the entrance of those at Gower Street, and may thus have materially contributed to the result. The attempt of the persons at the Portland Road Station, if the jury were of opinion that their being enabled to make the attempt was attributable to negligence in the company's servants, was the immediate occasion of the closing of the door by the porter, to whom, I think, no blame can properly be attached for so doing, and thus was the proximate cause of the injury of which the plaintiff complains. I am wholly at a loss to see how it can be said that this was a question which, upon the evidence before them, it was not within the competency of the jury to decide, or which would properly have been withdrawn from their consideration.

I am therefore of opinion that the decision of the Court of Common Pleas was right, and that the appeal must consequently be dismissed.

Judgment affirmed.

Solicitor for plaintiff: *W. W. King.*

Solicitors for defendants: *Burchells.*

(1) Law Rep., 7 H. L., 218.

[2 Common Pleas Division, 146.]

Jan. 11, 1877.

*HART and Another v. WALL.

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Libel, in the Nature of Slander of Title—Special Damage.

The plaintiffs, vocalists, advertised in a theatrical newspaper, as follows: "The Sisters Hartridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co." (music publishers), "and others, for their kind unhesitating permission to sing any morceaux from their musical publications." The defendant, who was interested as agent for the proprietors of the "stage-right" of certain songs published by the firms mentioned, wrote to the proprietors of two music halls at which the plaintiffs were engaged to sing, to the effect that the advertisement, if relied upon in every particular, was calculated to lead them to incur penalties under the Copyright Act, inasmuch as the publishers named had in some instances no power to give

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the alleged permission, and insinuating that music hall singing was not calculated to create a demand for their musical publications. Upon a motion to set aside a nonsuit:

Held, that, inasmuch as the letters were reasonably susceptible of a construction which would make them libellous, the opinion of the jury ought to have been taken upon their meaning.

CLAIM. 1. The plaintiffs were at the times hereinafter mentioned, and still are, vocalists, and had been and were engaged to sing at the Sun Music Hall, Knightsbridge, and also at the London Pavilion Music Hall, for reward payable to the plaintiffs for their services, and they appeared and sang in public under the name of The Sisters Hartridge.

2. On the 15th of January, 1876, the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. Williams, Esq., the proprietor of the Sun Music Hall, of the plaintiffs and of them as such vocalists, and of their engagement at the Sun Music Hall, the words following, that is to say,—“January 15th, 1876. E. Williams, Esq. My dear Sir,—Although I know it is quite unintentional on the part of the lady advertisers (meaning the plaintiffs), the advertisement attached at foot, if relied upon in every particular by proprietors engaging them, is calculated to lead such proprietors to incur the penalties under the Copyright Act in certain cases, as I hold the power of attorney over the performing rights of certain musical publications belonging to two houses therein named, who only have the copyrights vested in them, and a separate and distinct *property never held by them. If all proprietors knew this, it would be best; but I have not time to apprise them. I remain, yours truly, H. Wall;” meaning that the plaintiffs had no right to sing certain songs which they advertised themselves as about to sing at the said music hall.

3. In consequence thereof, and by the publication of the said words, E. Williams dismissed the plaintiffs from his service and terminated the said engagement at the Sun Music Hall.

4. On the 19th of January, 1876, the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. Loibl, Esq., the proprietor of the Pavilion Music Hall, of the plaintiffs, and of them as such vocalists, and their engagements at the said music hall, the words following, that is to say,—“January 19th, 1876. E. Loibl, Esq. Dear Sir,—That you may not be misled, I beg to state, that, with reference to an advertisement

in the last *Era*, where the Misses Hartridge (meaning the plaintiffs) give notice that they have received unhesitating permission to perform any morceaux from any publication of certain publishers therein mentioned, it would be as well for you to know that, if two of the firms really had pretended to have given such unqualified sanction, that I hold powers of attorney over certain publications issued by them as to the sole liberty of public performance, which right they never possessed. But Messrs. Chappell & Co.'s representative to-day informed me that they only granted permission for two songs in particular (which were named), and they were not aware it was for music hall singing, as they have a poor opinion of such creating any demand for their publications; and moreover that they require the advertisement to be altered. And Messrs. Metzler & Co.'s representative, in the presence and hearing of Mr. Brown (the head man of Mr. Cunningham Boosey) yesterday stated to me that he had granted no permission whatever, but, on the contrary, that they had informed the ladies (meaning the plaintiffs) their charge for such permission would be 7s. per night (£2 2s. per week), as much again as Messrs. Boosey named" (meaning that the plaintiffs had advertised themselves to sing at the said music hall songs which they had no right to sing).

5. In consequence of the publication of these words, E. Loibl *dismissed the plaintiffs from his service, and [148 dispensed with their services and refused to employ them to sing at the said music hall; and the plaintiffs were and are by means of the premises otherwise injured.

Claim £100 damages.

Defence. 1. The defendant denies the whole of the allegations contained in the first paragraph of the statement of claim.

2. The defendant denies the allegations contained in paragraphs 2, 3, 4, and 5 of the said statement of claim.

3. The defendant further denies that the alleged libels and each of them as disclosed in paragraphs 2 and 4 respectively were written and published as therein alleged.

4. The defendant further says that the alleged libels and each or either of them were privileged communications written by the defendant under the protection of privilege.

5. The defendant further says that the alleged libels and each or either of them, and each and certain part or parts thereof, were true in substance and in fact.

Joinder of issue.

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The cause was tried before Archibald, J., at the last Trinity Sittings in London. It appeared that the defendant was agent for the proprietors of various musical and dramatic copyrights, receiving (generally under powers of attorney) the fees or allowances usually paid to the authors or proprietors of such copyrights for their representation in theatres or concert rooms. Seeing an advertisement of the plaintiffs in the *Era* newspaper of the 16th of January, 1876, to the following effect,—“The Sisters Hartridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co., and others, for their kind unhesitating permission so sing any morceaux from their musical publications,”—the defendant addressed the letters set out in the statement of claim to the two gentlemen therein mentioned respectively.

It was admitted on the part of the plaintiffs that the defendant had not written anything untrue to his knowledge; and on the part of the defendant it was submitted that the letters were not libellous.

The learned judge, after consulting Quain, J., nonsuited the plaintiffs.

[49] *July 24. *Glynn* obtained an order *nisi* for a new trial, on the ground that “the statement of claim disclosed a libel.”

Jan. 11, 1877. *Philbrick*, Q.C., showed cause: The letters contain nothing which is at all derogatory to the plaintiffs, no reflection upon their characters, moral or professional. Nor can they be relied on as being in the nature of slander of title: that sort of action can only be maintained where there is malice; damage only is not enough: *Brook v. Rawl* ⁽¹⁾. The first letter amounts only to a caution: and the second was meant as a warning to the proprietors of places of public entertainment that the advertisement of the Sisters Hartridge was not to be implicitly relied on. [*Young v. Macrae* ⁽²⁾ and *Wren v. Weild* ⁽³⁾ were also cited.]

Talfourd Salter, Q.C., and *C. Scott*, contra, were not called upon.

LORD COLERIDGE, C.J.: I am of opinion that this rule should be made absolute. The two letters in question were addressed by the defendant to the proprietors of two places of musical entertainment with whom the plaintiffs had pro-

⁽¹⁾ 4 Ex., 521; 19 L. J. (Ex.), 114.

⁽²⁾ 3 B. & S., 264; 32 L. J. (Q.B.), 6.

⁽³⁾ Law Rep., 4 Q. B., 730.

fessional engagements. The cause of the writing of the letters was an advertisement published by the plaintiffs in the *Era* newspaper, to the following effect,—“The Sisters Hart-ridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co., and others, for their kind unhesitating permission to sing any morceaux from their musical publications.” It is not denied that the fair construction of that advertisement may be, that the plaintiffs think they have permission from the publishers named to sing in public any songs published by them, as to which they have authority to give them such permission, and not songs as to which they have no such authority. The question is not whether the letters are susceptible of an innocent interpretation, but whether no libellous construction can reasonably be put upon them; for, if such a construction may reasonably be given to them, it is for the jury to say whether or not that is the true interpretation of them; and that question should not have been withheld from them. Now, it appears to me that both letters are susceptible of two constructions, the one *an innocent the other a [150 libellous construction. If it had been left to the jury and they had found that the construction put upon the letters by Mr. Philbrick was the proper one, I am not prepared to say that I should not have assented to it. But it is not unreasonable to say that the letters are also open to this construction,—These ladies have stated in their advertisement that which is not true. They have vouched Messrs. Chappell & Co. and Messrs. Metzler & Co. as having given them permission to sing any songs published by them, whereas those gentlemen have no right to give such permission; and, if you rely upon the advertisement and act upon that statement, you (the persons to whom the letters are addressed) may get into difficulties. It was clearly matter for a jury. I quite agree that the fact of damage having followed from the publication of the letters is immaterial in considering what is the construction of them. If the letters are capable of the construction I have put upon them, they should have been left to the jury. This was not done, and consequently there must be a new trial.

LINDLEY, J.: I am of the same opinion, and for the same reasons. The letters in question are reasonably susceptible of two constructions, one of which would be libellous, the other not. It is quite consistent with the letters, coupled with the advertisement, that the defendant was not acting *bona fide*, but in writing the letters was prompted by mali-

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cious motives. If he really had in view only the protection of his own rights, or the rights of others on whose behalf he was acting, he should have stated what particular songs he wished to protect.

Order absolute.

Solicitors for plaintiffs: *Thomas Beard & Son.*

Solicitor for defendant: *T. L. Allen.*

[2 Common Pleas Division, 151.]

Feb. 6, 1877.

[IN THE COURT OF APPEAL.]

151] *CHARLES and Another v. BLACKWELL and Another⁽¹⁾.

Check—Banker—Order—Indorsement by Agent—Payment—Authority—16 & 17 Vict. c. 59, s. 19.

An indorsement of a check payable to order, purporting to be by the agent of the person to whose order the check is payable, is, within 16 & 17 Vict. c. 59, s. 19, a sufficient authority to the banker to pay the amount of such check, though the person who indorsed the check had no authority to indorse.

S. K., an agent of S. & Co., the plaintiffs, having authority to sell goods for them and to receive payment by cash or check, but not having authority to indorse checks, received from the defendants, in payment for goods supplied, a check on their bankers drawn payable to S. & Co., or order. S. K. indorsed it "S. & Co., per S. K., agent," received the money from the bankers, and misappropriated part of it. The bankers returned the check to the defendants, and the amount was allowed in account by the defendants:

Held, affirming the decision of the Common Pleas Division, that such payment by the bankers was within the protection of 16 & 17 Vict. c. 59, s. 19; and that the plaintiffs could not maintain an action against the defendants, either for the price of the goods or for the check.

APPEAL from the decision of the Common Pleas Division discharging an order for a new trial.

The action was for the conversion of a check, with a count upon the check and a count for goods sold, &c.

Plea, amongst others, not guilty.

The cause was tried before Lord Coleridge, C.J., at the Michaelmas London Sittings, 1875, and the facts, according to the evidence for the plaintiffs, were as follows: The plaintiffs carried on business in Milk Street, London, under the name of Charles & Co. They had started a separate business in Jewin Street, under the name of Smith & Co., which was managed by one Samuel Kingsford as their agent. In November, 1874, the defendants had bought goods from Smith & Co., and the invoices were sent to the defendants through Kingsford. The defendants paid for the goods by

(¹) Affirming 18 Eng. Rep., 184.

two checks, one for £350, and one for £150, drawn by the defendants on the London and County Bank, and made payable to "Smith & Co., or order." Kingsford indorsed them "Smith & Co., per S. Kingsford, agent," and obtained payment of the money from the London and County Bank. The check was returned *by the bankers to the de- [152
fendants, and the amount was allowed in account by the defendants. Kingsford became a defaulter to the plaintiffs to the extent of £262, which sum this action was in fact brought to recover. Mr. Charles, one of the plaintiffs, admitted that Kingsford had authority to receive payment for goods on their account in cash or by check, but denied that he had authority to indorse checks.

The evidence is stated in detail in the judgment of the court.

After the first witness for the plaintiffs had been examined, Lord Coleridge, C.J., expressed his opinion that even if all the witness had stated was true, the plaintiffs had no case. The counsel for the plaintiffs admitted that their other witnesses would not carry the case further. The counsel for the defendants said they had a complete answer, and would not consent to any leave being reserved to enter a verdict, but would accept a nonsuit. The Chief Justice thereupon directed a nonsuit, some admissions being made on both sides, amongst which was an admission by the defendants that Kingsford had no authority to indorse checks. The plaintiffs obtained an order *nisi* for a new trial, which order was discharged by the Common Pleas Division⁽¹⁾.

The plaintiffs appealed.

Jan. 30. *Herschell*, Q.C., and *Lumley Smith*, for the plaintiffs: If this indorsement is sufficient, there is no protection in making a check payable to order. But for the Stamp Act, 16 & 17 Vict. c. 59, s. 19⁽²⁾, the case would be plain, and the bankers would clearly be liable. The act does not protect the bankers, for the check does not purport to be indorsed by the payee. It is not true that the act meant merely to give the protection of the fear of punishment for forgery. When the act was passed such an indorsement was not a forgery, and it was only made so by a subsequent statute, 24 & 25 Vict. c. 98, s. 24. The banker was not bound to pay on such an indorsement, and might have required time for inquiry to be given.

[COCKBURN, C.J.: Would not the banker have been liable to an action?]

⁽¹⁾ 1 C. P. D., 548; 18 Eng. Rep., 184.

⁽²⁾ The section is set out in the judgment, *post*, p. 155.

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Not if he only waited till he could inquire; on any other
153] *doctrine a most unfair liability would be imposed on the banker. Besides, the Stamp Act only applies as between the banker and his customer, and does not affect any one else. This check has, in fact, not been paid; it still belongs to the plaintiffs, and can be recovered in trover. The plaintiffs can then sue upon it, and the bankers have their remedy against Kingsford. The plaintiffs can also recover for the price of their goods. Money paid on a forged indorsement can be followed: *Ogden v. Benas* ⁽¹⁾. *Cookson v. Bank of England* ⁽²⁾ can scarcely be relied on, and has been disapproved of. The act cannot have meant that a check made payable to the order of one person will, when indorsed by any person, become payable to bearer. No doubt Kingsford was the plaintiffs' agent, but that does not signify, unless he had authority to indorse checks.

Murphy, Q.C., and *Channell*, for the defendants: The plaintiffs by their conduct invited the defendants to trust Kingsford; if the defendants had not been stopped by the judge at the trial they could have shown that there was a perfect answer to the action, and that they were fully authorized by the plaintiffs to pay in this manner. If the plaintiffs think that they can recover on the check, let them bring their action against the bankers, and give secondary evidence as to the check. The statute was not intended to give any additional protection to the seller of goods, and was merely for the protection of the banker. At all events, the plaintiffs' agent has received the money for the check, and has carried it to account, exactly as he would have done if the defendants had paid in cash or by a check payable to bearer. The defendants might have paid in that way, and only made the check in this form in order to get a receipt and as a precaution. The statute must have intended to include indorsements by agents; for firms and corporations cannot indorse in any other way. To come to any other decision would throw a heavy *onus* on bankers, whereas by holding the indorsement good, the plaintiffs only bear the ordinary penalty of having a dishonest servant. The defendants had nothing to do with any one but Kingsford, and when once by any means their money got into his hands, the goods were paid for. If the bankers had
154] come to the defendants, *and had asked whether they were to pay on that indorsement, they would have been told to pay, and surely that would have been a good payment.

⁽¹⁾ Law Rep., 9 C. P., 513.

⁽²⁾ 13 Ir. C. L. Rep., at p. 438.

Herschell, Q.C., in reply, cited *Alexander v. Mackenzie* ⁽¹⁾.
Cur. adv. vult.

Feb. 16. The judgment of the Court (Cockburn, C.J., Mellish, L.J., and Baggallay and Bramwell, JJ.A.) was delivered by

COCKBURN, C.J.: This is a case of considerable importance to the mercantile world, and especially to bankers, and it is one of some nicety. The facts are as follows:

The plaintiffs in the court below, the appellants here, carried on business in Milk Street. Apart from their proper establishment, they also carried on, under the style of Smith & Co., a separate business in Jewin Street, through the agency of one Kingsford, who had the general management of this business, with authority to sell goods and to receive payment for them, not only in cash, but also in checks; but who, it was admitted, had no authority to indorse checks made payable to the order of Smith & Co. The defendants having been supplied with goods by Kingsford, on behalf of Smith & Co., invoices were prepared by Smith & Co., in the following form: "Bought of Smith & Co., merchants, London," and in the margin, "Agent, S. Kingsford, Jewin Street." These invoices were sent to Kingsford, and were forwarded by him to the defendants. The latter delivered to Kingsford in payment a check on their bankers, payable to "Smith & Co., or order." Kingsford having, as has been already stated, no authority to indorse checks, indorsed this check, not indeed with the name of the firm *simpliciter*, but in the following form: "Smith & Co., per S. Kingsford, agent." The defendants' bankers paid the check so indorsed on presentment, and the money was received by Kingsford: Kingsford having failed to account to his employers for a sum of £262 out of the moneys received by him on their account, the plaintiffs claimed payment of this as part of the proceeds of this check, on the ground that Kingsford having no authority to indorse the check, they were not bound by the *unauthorized payment [155 of it to him by the bankers. This demand being resisted by the defendants, the present action was brought to recover so much of the proceeds of the check as had not been accounted for by Kingsford, or, at all events, to recover the check itself as still remaining their property, in order that they might duly indorse it, and present it to the bankers for payment. The Lord Chief Justice of the Common Pleas having, on these facts, nonsuited the plaintiffs on the trial

(1) 6 C. B., 766.

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at *Nisi Prius*, a rule *nisi* for a new trial, on the ground of misdirection, was granted, but that rule was, after argument, discharged by the Divisional Court of Common Pleas, and the question is, whether the order discharging it was right.

The first question which presents itself (its bearing on the case will be seen further on) is whether, as between themselves and their customers, the defendants in the action and the respondents here, the bankers were justified in paying the check. By 16 & 17 Vict. c. 59, s. 19, "Any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove that such indorsement or any subsequent indorsement was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof."

It is under this enactment that the payment of this check by the defendants' bankers is said to have been warranted, and the contention on the part of the defendants is that, the check having been taken in payment, and paid by the defendants' bankers on presentment, under circumstances which made it under the statute a good payment against them, there has been no default on their part, so as to render them liable to make good the loss to the plaintiffs, or to restore the check, which as soon as it was paid became theirs, and which they are therefore entitled to retain. But it is said on the other side that the present case is not within the foregoing enactment, because the indorsement does not purport to be that of the persons to whom the check is made payable [56] but that of the payees, "by S. Kingsford, agent." In dealing with this objection, let us first see what before the statute would have been the position of the parties, with reference to a check on demand made payable to order and therefore requiring indorsement. The only reason why checks were not so drawn before the passing of 16 & 17 Vict. c. 59 was that they required the same stamp as a bill of exchange of the like amount. With the necessary stamp such a check would have been perfectly valid. And first let us consider it with reference to an agent indorsing by procuration, having an authority so to indorse. A check on a banker being for the most part, in effect, an inland bill of exchange, and there being nothing in point of law to prevent a check from being drawn to order, as well as a bill of

exchange, whatever indorsement would have been a sufficient indorsement of a bill of exchange made payable to order would have been a sufficient indorsement of such a check. Therefore, inasmuch as a bill of exchange payable to a given person might be indorsed by procuration by an agent having authority to indorse, if an agent having such authority had indorsed such a check on behalf of the payees, there can be no doubt that the payment of the check by the banker would have been a good payment as between him and his customer, the drawer, and a good payment likewise as between the drawer and the payees, though the agent should have embezzled the proceeds of the check.

Now the purpose of the enactment we are dealing with was, when checks payable to order were expected to become general, to protect bankers against the possibility of forged indorsements. The only reason why checks had not been drawn payable to order before being, as I have stated, the expense of the stamp, when the Stamp Act of 16 & 17 Vict. included these checks among those which should be subject to the penny stamp, it was of course foreseen that the great convenience arising from the use of such checks would make them of constant recurrence. It was equally certain that the use of checks drawn to order would expose bankers to serious danger from forged indorsements, payment upon which, as the law then stood, would have been to their own loss. It was against this danger that the 19th section of the act was intended to protect them. Against forgery of the writing of *his own customers the banker must [157 be assumed to be capable of protecting himself. He is, or ought to make himself acquainted with the signatures of his own customers. He cannot be acquainted with the signatures of the multitude of payees or agents who may have to indorse checks drawn upon him, and made payable to order. It was not unreasonable, therefore, that while the customer obtained the advantage of being able to draw checks payable to order, the possibility of forged indorsements should be, as between him and the banker, at his risk. By making a check payable to order, the drawer obtained the advantage that if the check is stolen or lost before it reaches the payee, it cannot be paid without a forged indorsement, the risk of which many persons, who would not scruple to present a check payable to bearer, in fraud of the true owner, and pocket the proceeds, might yet be unwilling to run. Furthermore, he obtains through the indorsement of the payee an acknowledgment of the receipt of the check and of its payment. Obtaining this benefit, it was but reasonable that

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the possibility of a forged indorsement should be at his risk, or at all events be a question between him and the payee, leaving the banker free from liability. But the danger to which the banker is thus exposed, from his ignorance of the handwriting of the indorsement, exists as much where the indorsement purports to be by an agent, as where it purports to be that of a payee. The form of indorsement by procuration, though not so common as the immediate indorsement of the payee, is yet sufficiently so to expose the banker to danger from spurious indorsements in this form, and we cannot doubt that it was the intention of the Legislature to protect him from the liability he could not guard against, whatever the form which the indorsement might assume. The enactment must have been intended to apply to both forms of indorsement—to that purporting to be by procuration, as well as to that purporting to be the indorsement of the payee.

The payment being thus good as between the banker and his customer, the drawer, we have next to consider what under these circumstances is the position of the payee. Of course, before the check has reached him no such question can arise. If it is abstracted from a letter, or is lost by a clerk or messenger while on its way to the payee, and a [58] forged indorsement is put on it by *some one into whose hands it has fallen, and the check is paid, the loss must fall on the drawer. It is as though the debtor had sent so much cash by an agent or messenger, and the money had been lost or stolen on the way, and had never reached the creditor's hands.

But suppose the check to have been delivered in payment to the payee, or to his authorized agent. The check then operates as payment, and extinguishes the debt, subject only to the condition that, if upon due presentment the check is not paid, the original debt revives. But if the check is stolen or lost by the payee, and, on its presentment by a party into whose hands it has fallen, is paid before the payee has had time to give notice of the loss to the banker, or while he delays giving such notice, the loss must fall on him. He has taken the check in payment, and cannot call upon his debtor for a second payment so long as the latter is in no default as regards payment of the check on presentation. Such is the practical effect of the decisions in the cases of *Hansard v. Robinson* ⁽¹⁾ and *Crowe v. Clay* ⁽²⁾ with reference to checks payable to bearer, as, practically, all checks were payable before 16 & 17 Vict. c. 59. And the

⁽¹⁾ 7 B. & C., 90.

⁽²⁾ 9 Ex., 604 ; 23 L. J. (Ex.), 150.

matter is equally clear on principle; for where the banker paid the bearer of such a check, he obeyed the mandate of his customer, the drawer, and could charge him accordingly; while, on the other hand, the customer was protected, and this even though the bearer so paid had no property in the check, but was himself a thief who had stolen it. The drawer was entitled to say to the payee: "I gave you an instrument which you were willing to take in satisfaction of your debt if the drawee paid its amount to the bearer, and this the drawee has done."

The present, however, is not a check payable to bearer, but to order; but can there be any difference in this respect between a check payable to bearer and one payable to order? Did not the statute mean that the same result should, and does it not, follow in a case like the present? The plaintiffs were content to take in satisfaction of their debt an instrument drawn on a banker, provided the banker paid it to their order, or what purported to be their order. Let us try it in this way. The action included a *claim for [159 the conversion or detention of the check. Suppose the defendant had delivered it back to the plaintiffs, what could the latter have done? They could maintain no action on the check, or for the goods in payment of which it was given, unless they presented the check, and it was dishonored, and notice thereof given. But on refusing to pay it a second time, the bankers would not dishonor it. They would indeed refuse to pay it, but only because they had paid it already. If the plaintiff should say, "Yes, but to one who had no title to the check," the answer would be that it had been paid to one to whom the banker was authorized to pay it by operation of the statute. A check payable to order, when taken in payment, operates, like a check payable to bearer, as payment till such time as default is made by the drawee on presentment of the check. Unless, therefore, the payees are in a position to show such default, how can they maintain an action in respect of the original debt?

Thus far we have been considering the 19th section with reference to a case in which, an agent having authority to indorse by procuration, the indorsement of the agent has been forged. But in the present instance we have to deal with a case in which the handwriting of the indorsement is not forged or spurious, but genuine. It is what it purports to be, an indorsement in the name of the payees by an agent; but the agent, though he had authority for other purposes, had no authority to indorse. Is the 19th section applicable to such a case? The enactment was intended to

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relieve the banker from liability, when paying on indorsements the genuineness of which he had no means of testing; but was it intended to relieve him from the ordinary duty of looking to see, before he pays a check made payable to order, that the indorsement is that of the proper indorser, as he would have had to do in the case of a bill of exchange accepted by his customer? If it was incumbent on him to do so, it may be said that the form of this indorsement, purporting to be that of an agent, would have made it incumbent on him to ascertain, before he paid the check, that the agent had authority to indorse; the effect of an indorsement by procuration being, according to the authority of the cases of *Alexander v. Mackenzie* ⁽¹⁾ and *Stagg v. 160* *Elliott* ⁽²⁾, to give *notice to whoever takes a bill (and the same principle must apply to a check), that the agent has only a limited authority, so as to put an indorsee to the necessity of ascertaining that the agent had authority before he took the bill. It is true those were cases in which the indorsee sought to hold an acceptor or indorser liable, but the reasoning would equally apply where the drawee is paying on an acceptance, or a check on which, if payment is made to a party not entitled as the proper transferee of the bill or check, the acceptor of the former or the drawer of the latter may still remain liable. On the other hand, it may be said that, though an individual or a company, taking a negotiable instrument by indorsement, may well be expected to ascertain the authority of the agent before they consent to take such an instrument on his indorsement, it would be a most serious hindrance to the dispatch so essential in banking business, and would create so serious an impediment to the negotiability of checks drawn to order, if a banker, paying on such an indorsement, were not to be protected, and were obliged in every instance first to satisfy himself of the agent's authority, that it may reasonably be assumed that the statutory immunity given to bankers was intended to include such a case. A confirmation of this view may be found in the second branch of the 19th section, which provides that it shall not be incumbent on any such banker to prove that such indorsement or any subsequent indorsement was made by, or under the direction or authority of, the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof. The purpose seems to have been to make the banker free of all responsibility in respect either of the genuineness or validity of the indorsement, whether pur-

⁽¹⁾ 6 C. B., 766.⁽²⁾ 12 C. B. (N.S.), 373; 31 L. J. (Ex.), 260.

porting to be that of the payee or subsequent indorser on the one hand, or of an authorized agent on the other.

If this be the effect of the section, the reasoning just now applied to the indorsement of an agent having authority to indorse applies also here. The check has been given and taken in payment. It has been paid. A portion of the proceeds has been lost to the payees, but by no default of the drawers. The check was paid on presentment, under circumstances which made the payment by the bankers lawful. The wrongful act, by which *the loss to the [161] appellants has been brought about, was the act of their own servant. The act was done by that servant not in fraud of the drawers or their bankers, but in fraud of his principals. Upon what principle, then, if the position holds good that a check operates as payment if paid on presentment, can it be said, after the payment of this check without knowledge on the part of the drawers or their drawees, that the party indorsing and presenting it was not entitled to the proceeds, that the respondents, the drawers, are bound to pay the amount a second time?

If this reasoning were not satisfactory to our minds, we should be of opinion that this case should go to a new trial, as, in one view of it, which was not submitted to the jury on the trial (a circumstance, we think, to be regretted), the payment to Kingsford was a valid payment independently of the statute. It appears to us that there was evidence, which might well have been submitted to the jury, not only that the appellants had so held out Kingsford as their general agent, as to justify persons dealing with them through him in treating him as such, but also to establish the position, notwithstanding the denial of the principals, that he was possessed of plenary authority to the extent of indorsing checks payable to the order of Smith & Co. The business in Jewin Street was carried on exclusively by Kingsford, whose name was printed on the invoices as carrying on the business there for Smith & Co. He conducted the business, not as a manager or foreman acting under the superintendence and direction of his principals, but apparently as authorized to do whatever was necessary in the business. Smith & Co., the principals, were not known in Jewin Street, nor was there any other place where they carried on business or could be found in that name. The respondents, in their dealings with Kingsford, do not appear ever to have been brought into contact with his principals. Ostensibly, the business was entirely in his hands. It is admitted that Kingsford was authorized to receive payments in cash, and

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also by checks, which, we presume, if payable to bearer, he would get cashed at the bankers' and would carry into account with his principals. Had this payment been made in cash or by a check payable to bearer, it would, as I gather from the evidence, have been within the competency [162] of Kingsford to accept payment in either form, *and to give a valid receipt. I very much question whether, if Kingsford had accounted to his principals for the whole of the proceeds of this check, any exception would have been taken by them to his proceeding in indorsing it. Upon this state of facts, if the question had been left to the jury, they would have been well warranted, I think, in finding possibly that Kingsford had implied authority to indorse, though none may have been given him expressly; at all events, that he was held out to the world as an agent invested with plenary authority, so that a check payable to the order of his principals might well be paid on his indorsement as their agent. Such a finding by the jury, had the trial not been cut short by the summary process of a nonsuit, might have prevented all subsequent litigation (').

Moreover, as far as I can make out, the proceeds of this very check may have found their way to the appellants. There is nothing, as I read the evidence, to show that Kingsford actually misappropriated any of the money received upon the check. The check, as it is exhibited among the documents, appears to have been crossed to the London and County Bank, Aldersgate Street—we presume the appellants' bankers. All that appears from the statement of the plaintiff Charles is, that a sum of £262 odd remains due to Smith & Co. from Kingsford on the account. It does not follow that the deficiency is of part of the money received on this check.

But though we should have thought it better that the question of Kingsford's authority should have been submitted to the jury, yet being of opinion that the nonsuit may be upheld in point of law, we do not think it necessary that the case should go to a new trial.

The question whether the plaintiffs could maintain trover for the check is neither more nor less than the question we have been before considering under another form, and has, in fact, incidentally to that question, been already disposed of. A check taken in payment remains the property of the payee only so long as it remains unpaid. When paid the banker is entitled to keep it as a voucher till his account

(') The defendants at the trial admitted that Kingsford had no authority to indorse: see p. 152.

with his customer is settled. After *that the drawer [163 is entitled to it as a voucher between him and the payee. If the check was duly paid, so as to deprive the payees of a right of action, either on it or in respect of the goods in payment for which it was given, they no longer have any property in it.

For these reasons we are of opinion that the judgment of the Divisional Court should be upheld and this appeal dismissed.

Judgment affirmed.

Solicitor for plaintiffs: *C. Sawbridge.*

Solicitors for defendants: *Allen & Son.*

[2 Common Pleas Division, 163.]

Feb. 6, 1877.

[IN THE COURT OF APPEAL.]

KEITH and Another v. BURROWS and Another⁽¹⁾.

Amount of Freight—Mortgagee of Ship—Cargo—Lien.

On the 1st of December, 1874, M., the owner of a ship, then at San Francisco, mortgaged it to the plaintiffs for £7,500 and further advances. On the 2d of December, the captain procured a cargo of wheat "on account of the ship," which cargo was consigned to the order of the shippers under bills of lading stating the freight payable on delivery to be 1s. per ton, and the shippers drew bills on M. for the price at sixty days' sight, which were attached to the bills of lading, and were accepted by M. The ordinary freight at this time was 55s. per ton. In pursuance of previous arrangements, the defendants advanced to M., on the 4th of January, 1875, £3,000, and on the 22d of February a further sum of £9,000, on the security of the cargo, to meet the bills of exchange, it being arranged that they should sell the cargo and receive the proceeds on M.'s account. On the 19th of February the defendants and M. sold the cargo to J. & Co. for 43s. 6d. a quarter, the contract stating, "as cargo is coming on ship's account, freight is to be computed at 55s. per ton." The bills of exchange were met by M. with the money advanced by the defendants, and on the 26th of February M. handed to them the bills of lading (indorsed by the shippers), and assigned to them the freight as at 55s. per ton. When the ship arrived, the plaintiffs took possession of her, and claimed payment of freight at 55s. per ton:

Held, that as the property in the goods remained in the shippers, the contract for 1s. freight was valid; but that there was no contract for freight at 55s., and that the 55s., though called freight, was, in fact, part of the purchase-money; and, therefore (reversing the judgment of the Common Pleas Division), that the plaintiffs, as mortgagees of the ship, were entitled to 1s. freight only, and not to 55s.

THE question argued before the Court of Appeal in this case was, whether the plaintiffs, as mortgagees of a ship, were entitled *as against the defendants, the owners [164 of the cargo, to freight at 1s. or at 55s. a ton. There was another question as to the effect of an unregistered mort-

(¹) Affirmed, *ante*, p. 145.

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gage, which it became unnecessary to argue before the Court of Appeal.

The facts of the case are stated at length in the report in the court below (¹), and are sufficiently given in the head-note.

The Common Pleas Division gave judgment for the plaintiffs on both questions, holding the plaintiffs entitled to the 55s. freight.

The defendants appealed.

Feb. 5, 6. *Webster* (with him *Thesiger*, Q.C.), for the defendants: This money is not freight, as the goods carried belonged to the owners of the ship. A mortgagee is not the owner until he takes possession: 17 & 18 Vict. c. 104, s. 70. *Brown v. Tanner* (²) does not affect this case. The contract of sale is not a contract to carry goods, and creates no freight. The 55s., though called freight, is merely part of the price of the cargo: *Howard v. Tucker* (³). In *Gumm v. Tyrie* (⁴) the goods were not the property of the shipowner. The real contract for freight was at 1s. a ton, and it could not be altered.

Herschell, Q.C., and *C. S. C. Bowen*, for the plaintiffs: A ship, though carrying goods for her owner, is earning freight which belongs to the mortgagee. As between the mortgagor's assignees and the mortgagees, the assignees could not have claimed this cargo and have refused to pay the proper freight. Why should there not be an implied contract to pay 55s., which was the regular freight? The master cannot by giving bills of lading in this shape affect the rights of the mortgagees. The reason why a nominal freight was charged was that the master could not tell what ought to be the freight, and so left it to be fixed by his owner, who has fixed it at 55s. The purchasers knew that freight was due, and made their contract in that shape, as did the defendants. If the ship completed her voyage, 55s. freight would be due, and the mortgagees must have it. All parties called it freight, and it is freight, and belonged to 165] the mortgagees when they had enforced *their claim by taking possession of the ship and cargo: *Liverpool Marine Credit Company v. Wilson* (⁵). Such freight can be earned: *Flint v. Flemyng* (⁶); *Weguelin v. Cellier* (⁷).

(¹) 1 C. P. D., 722.

(²) Law Rep., 3 Ch., 597.

(³) 1 B. & Ad., 712.

(⁴) 4 B. & S., 680; 6 B. & S., 298; 33 L. J. (Q.B.), 97; 34 L. J. (Q.B.), 124.

(⁵) Law Rep., 7 Ch., 507.

(⁶) 1 B. & Ad., 45.

(⁷) Law Rep., 6 H. L., 286.

Webster, in reply, cited *Devaux v. J'Anson* ⁽¹⁾ as to the meaning of the word "freight."

MELLISH, L. J.: As we have not heard the argument on the second point in this case, we are bound to assume that the plaintiffs have all the rights of a mortgagee of a ship who has taken possession of the ship; and amongst those rights is, as is well settled, a right to all the freight which he finds accruing at the time when he takes possession; and if he finds any cargo on board in respect of which the freight has accrued, and on which the mortgagor has a lien for the freight, the mortgagee succeeds to that lien, and can enforce it in a court of law. The question to be determined in this case is whether there was any accruing freight to which the mortgagee was so entitled. It was argued by Mr. Herschell, as the foundation of his case, that the mortgagee had a greater right, and that if the mortgagor had carried a cargo on his own account, which cargo the mortgagee found on board when he took possession, he would be entitled to a lien on it for freight as against the mortgagor, although it is obvious that in that case there would be no contract for freight. Now I am clearly of opinion that the mortgagee has no such right. The mortgagee does not become the owner of the ship until he takes possession. There is a clause in the Merchant Shipping Act (17 & 18 Vict. c. 104, s. 70) to that effect. Mr. Herschell seemed to argue that he ought to have that right; as if the goods had, in fact, been carried in the mortgagees' ship. But even if the mortgage in this case had been made before the voyage commenced, the rights of the mortgagees to the accruing freight would be exactly the same, and it would make no difference whether the mortgage happened to have been created prior to the commencement of the voyage or the very day before they took possession of the ship. Therefore it is not true that the goods have been carried in the mortgagees' ship, for the ship was the mortgagor's ship until the mortgagees took possession. The purchaser takes the right to all accruing freight from the time of assignment, the mortgagee only from the time of his taking possession. Now if the owner, whilst carrying goods in his own ship, were to sell the ship, it cannot be contended that there would be any freight to be paid to the purchaser in respect of a voyage that had been then already performed. Therefore I am clear that the mortgagees have no right to what they contend is accruing freight, unless they can find in existence at

⁽¹⁾ 5 Bing. N. C., 519.

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the time when they take possession a contract by which freight was to be paid to the mortgagor.

Now in this case, although the goods were shipped on account of the owner of the ship, yet Parrott & Co. did not part with the property in them, because they were to be paid for by bills drawn by the master on London, and Parrott & Co. took a bill of lading making the goods deliverable to their own order. Therefore the property did not pass to Morison, the shipowner, until the bills of exchange were paid, and in the meantime there was a good contract to carry as between Parrott & Co. and Morison at 1s. per ton. And it is obvious why the 1s. freight was charged: If the ordinary freight had been charged and the price of wheat had fallen, Parrott & Co. might be losers, whereas by charging a nominal freight they could be losers only if wheat fell so much as to be cheaper in England than in California. It was admitted that this contract was perfectly valid, and that the security of Parrott & Co. could not be interfered with by the mortgagees, and that if the bills were dishonored Parrott & Co. would have had the goods on payment of the 1s. freight. Then whilst the goods were on the voyage Morison had to provide for the bills, and he entered into the contract with the defendants, the substance of which was that in consideration of the defendants advancing the money they were to receive the security of Parrott & Co. No doubt it was perfectly competent for Morison to make that contract, and to put the persons who advanced the money in the same position as Parrott & Co. were, namely, that they should have a security upon the entire price of the goods, subject only to the nominal freight. But then we find that the defendants advanced a further sum upon the same security; and the whole case for the plaintiffs depends upon the contention that by the blundering mode in which the parties 167] carried out that *contract the defendants failed in getting the full security, and without the smallest necessity have enabled the mortgagees to say that this large sum called freight belongs to them. Now, whether the defendants are to suffer for that blunder depends entirely upon the construction to be put on the contract of the 19th of February, 1875. It was part of the arrangement that the defendants were to sell the goods, and to appropriate part of the money to the payment of the bills, and accordingly the defendants sold the goods in the ordinary way. [The Lord Justice read the material parts of the contract set out in par. 16 of the case (').] If the contract had stopped short

(') 1 C. P. D., at p. 725.

of the last clause, it would be an ordinary contract for the sale of goods, freight, and insurance, and the only freight to be paid would have been the nominal freight. Of course in the ordinary case the price is all purchase-money as between the vendor and the purchaser, though a part of the purchase-money has to be applied in payment of the freight which would be due to the shipowner. But as the purchaser would expect to pay the freight only on the ship's arrival, and on the delivery of the goods, this last clause, on which the whole case turns, has been inserted: "As cargo is coming on ship's account, freight is to be computed at 55s. per ton," the object being that the purchaser might have the advantage of keeping back a sum equal in amount to the freight until the arrival of the ship. No doubt the parties call it "freight," because that is the only word by which it could properly be described, but the question is, whether it is really freight. In my opinion, nothing is freight unless there is involved in it a contract to carry; for freight is a sum payable in respect of a contract to carry, and if there is no contract to carry, then, although the sum to be paid may be called freight, it is not in point of law freight within the rule that the mortgagee is entitled to the accruing freight.

Mr. Herschell argued with great ingenuity and ability that there was a contract for freight, and for this reason: He said, the goods are shipped on the shipowner's account, and there is, therefore, so far, no contract for carriage; but whilst the goods are at sea, if the shipowner chooses to sell, there is nothing to prevent him from selling the goods and from charging for the freight. But that *argument [168 seems altogether to overlook the fact that it is quite incorrect to say that in this case there was no previous contract of carriage. There was a perfectly good contract of carriage contained in the bill of lading, and, as I have already observed, it was not a mere sham, as if the goods had been really the shipowner's own goods at the time when they were shipped. A bill of lading is, under those circumstances, often executed, but it is a sham, and not evidence of any real contract; or, if it did operate as a contract, it would be only by way of estoppel. That was not the case here. There was a perfectly good contract of carriage, and the goods were not to be delivered until the bills of exchange had been paid; and if it had become necessary for Parrott & Co. to bring an action on account of the goods having been damaged, they could no doubt have done so. Why should there be a second contract of carriage, one assignable

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as being contained in the bill of lading, the other not assignable as not being contained in the bill of lading or in a negotiable instrument? I am of opinion that the court must look at what the 55s. really is, and it really is purchase-money. The effect of the contract is simply this, that of the purchase-money the 43s. 6d. per quarter is to be paid at once, and the residue, namely, what is called freight at 55s. on the arrival of the ship. That was the only object they had to effect, and in my opinion the mere fact that they called the 55s. freight ought not to prevent the carrying out their contract, particularly as the effect of not construing it in that way would be that we should deprive the defendants of the perfectly good security which Morison was perfectly entitled to give them. That being the true construction of the contract, Morison, for the purpose of securing the defendants, makes the further assignment of the 24th of February, 1875, again no doubt calling the 55s. freight; but that cannot alter its real nature—it was still part of the purchase-money, and not anything else. The defendants had sold the goods, and that part of the money which they were to receive at once was to be applied towards taking up the bills; and to secure the repayment of further sums advanced they were to receive the rest of the purchase-money. This further appears from the fact that the assignment authorizes them to receive from the purchasers this sum which they call freight. I am, [169] therefore, of opinion that, though there *was a cargo on board, and though Morison had a lien on that cargo for the sum to be paid on the delivery of the cargo, he had that lien, not as shipowner for freight, but as vendor for unpaid purchase-money. I am of opinion that, except the nominal freight, there was no accruing freight, and that the court is not bound to construe this as being a contract for freight for the purpose of giving the mortgagees of the ship a better security to the prejudice of the defendants, who have *bona fide* advanced their money, with notice of all the circumstances in the contract, on security which appeared to be, and in my opinion was, a perfectly good security.

BAGGALLAY, J.A.: I am entirely of the same opinion as that expressed by the Lord Justice Mellish, and for the same reasons; and I have nothing to add to what he has said.

BRAMWELL, J.A.: I am entirely of the same opinion, and the Lord Justice has so entirely expressed the view I take of the case, that if this were a small amount, or a case which was now heard for the first time, I should say nothing, because I do not think I can add to the reasoning that has

been given. But considering that this case is upon appeal, and possibly may go further, and considering the largeness of the amount involved, I think it is desirable to say in my own language why I entertain the opinion that I do entertain. A purchaser or a mortgagee taking possession of a ship before the voyage is ended, and finding goods on board which have been carried on the terms that freight should be paid, and on which there is a lien, is entitled to that freight, and the plaintiffs here were so entitled. The question is whether they were entitled to 1s. or 55s. In my judgment they were entitled to 1s. only. Mr. Herschell says they were entitled to 55s., because there had been an agreement to pay that sum as freight. But freight supposes a contract and two persons parties to it, the one who is to carry the goods, and the other who is to pay freight for them. Is that the case here? Mr. Herschell says it is, and that there has been a contract of carriage entered into between these two parties, Morison, the shipowner, and Jump & Sons, the buyers of the goods, and he says that the contract was this: "Whereas my ship and the cargo on board are now in mid-ocean, I will undertake *to carry the goods [170 from wherever they are in that ship, and deliver them to you, Jump & Sons, at a freight of 55s., putting myself in the situation of a carrier, and you in the situation of the freighter, the voyage commencing wherever the ship may be at the time when the contract of sale is entered into." That is a very ingenious argument, but in reality it is wholly unfounded, and it results from looking at a word instead of looking at the substance of the thing. There is no pretence for saying that in reality there was a contract for carriage between these two parties, so that the buyer would be entitled to say, "I gave you 55s. a ton freight, and you have not performed your contract of carriage because, by the fault of the captain or the sailors, my goods have been damaged." There was no such intention in their minds, but they have used the word "freight" for a reason which is obvious: When a person buys a floating cargo, as a rule, if it is not the cargo of the shipowner, he does not pay the freight unless the cargo arrives, nor until the cargo arrives; therefore Jump & Sons, when they were purchasing—like any one else who was purchasing in the market—a floating cargo, desired to purchase it upon the same terms as if Morison had not been the shipowner, but had been the shipper of the cargo, or a person interested in the cargo, or it had been shipped upon his account from abroad. That is the reason why this term is used. Suppose that instead of put-

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ting in the word "freight" they had put in "a sum to be in the nature of freight," or some such expression as that, meaning a sum not to be payable unless the ship arrives, and only when the ship does arrive, and that it should be taken at 55s., what would have been the result? The word "freight," which has given rise to this controversy, would not have applied; but here they used the word as is commonly done by people who do not foresee the mischievous consequences which may arise from want of precision in their expressions.

The truth is that this is a contract for the sale of goods. If, as the Lord Justice says, Jump & Sons had resold the cargo (which they did), the same expression would have been used, and yet could it be pretended that the purchaser of the cargo intended to enter into any contract of freightment or for paying freight as such? And what difference is there that in this case the purchase is from Morison, and why [171] should we put a different interpretation *upon this contract to that which we should put upon any other for the purchase of goods from a shipper who was not a shipowner? Let us test it in this way. Supposing an action had to be brought by Morison against the defendants, would it be for goods sold and delivered, or for freight? It would be clearly an action for goods sold and delivered. Any lien that Morison would have had in this case would, in my opinion, have been a lien for freight to the extent of 1s. only, and as to the rest a lien as an unpaid vendor. And it should be remembered, in considering this case as to the interpretation to be put upon this contract (to which, be it observed, the plaintiffs were not parties), that the defendants' title had already accrued. The sale was on the 19th of February, and the bills were not paid until the 22d of February; but the agreement between Morison and the defendants, under which their title accrued, was made at some time in December or in the beginning of January. [The learned judge read the 11th and 13th paragraphs of the case.] So that the defendants' title accrued certainly as early as the 4th of January, and at that time they of course would have been entitled to say to Morison, "You shall not sell upon any terms to make a larger sum than 1s. payable for freight." Otherwise they would have lost their full security. If that be so, the suggestion is, that the defendants nevertheless (I will not say with their eyes open, but through forgetfulness or in some way) have flung away security to the extent of upwards of £3,000. I am of opinion that that is not so, that there was no con-

tract of freight here except for the 1s., and that the plaintiffs had no title to the 55s.

And it is a convenient thing that we should hold this to be so, because, although no doubt it may be very useful that people should be encouraged to lend money on the mortgage of ships, yet, if they choose to leave the mortgagors in possession, it is also very desirable that the mortgagors should have the power to deal with the ships in the most advantageous way; and there can be no doubt that occasionally it is very advantageous that shipowners who cannot get a freight should themselves have a mercantile venture, as in this case. Now Parrott & Co. would not have shipped unless there had been this margin, and the defendants would not have advanced money to take up these bills* unless they knew there was a safe mar- [172 gin. They knew they would get Californian wheat here freight free, which was a guarantee against any loss unless there was a very extraordinary fall. But suppose these bills had been dishonored, what freight would then have been payable? Suppose the defendants had not advanced the money to take them up, though the contract for sale had been made? The shippers' freight agent in that case would have been only held liable for 1s.: and why should the defendants be held liable for more? Upon these grounds I am of opinion that the judgment should be reversed.

But there is another point to which I should like to call attention. It is respectful to the court below to say that in their judgment this matter was almost assumed, and, as it seems to me, without adequate reason being given, it was taken as a thing which was clear and certain⁽¹⁾. Another observation is, that the cases show that freight cannot be assigned as against the mortgagee of the ship; that is to say, if Morison had been minded to raise money upon his right to the 1s., he could not have done so to the injury of the mortgagees when they took possession, so as to give any one a preference over the mortgagees. But this is not an assignment of freight, and, as I have said already, this is no creation of freight; but, assuming that freight was created, we must take it that it was created by a contract between Morison and Jump & Sons, by which Jump & Sons are to pay freight, not to Morison, but to the defendants. It is, therefore, not the case of assigning freight and giving an equity, but it is a case of making a sort of trilateral bargain, by which the defendants would be entitled to the freight from Jump & Sons. •

(¹) See 1 C. P. D.; at p. 730.

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I am of opinion that there was no contract of carriage except for 1s.; and if in any point of view it can be said that there was such a contract, then, at the very time when the freight was brought into existence, it was brought into existence as a thing to be paid, not to the shipowner, but to the defendants.

Judgment reversed.

Solicitors for plaintiffs: *Freshfields & Williams.*

Solicitors for defendants: *Lowless & Co.*

[2 Common Pleas Division, 173.]

Jan. 13, 1877.

173] *MARY ANN HARRIS, Administratrix of JAMES SULLIVAN, deceased, v. THE HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN-GESELLSCHAFT, OWNERS OF THE STEAMSHIP FRANCONIA (').

Practice—Service of Writ upon a Foreigner residing Abroad—Local Limits of the Court's Jurisdiction—Order XI, Rule 1.

Sect. 527 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, which gives a remedy in certain cases against the owner of a foreign ship for damage done to a British subject in any part of the world, is confined to damage to *property*, and does not extend to injury to the *person*.

The ordinary courts of this country have no jurisdiction over acts done by foreigners on the high seas below low-water mark: consequently, Order XI, Rule 1, of the Rules of 1875, does not warrant an order for the service of a writ on a foreigner residing abroad, in respect of a cause of action arising at sea below low-water mark, though within three miles of the English coast.

Reg. v. Keyn (2 Ex. D., 63) held binding to that effect on all the courts.

THIS action was brought by the plaintiff as administratrix of James Sullivan, deceased, to recover damages (under Lord Campbell's Act, 9 & 10 Vict. c. 93) sustained by herself and children by reason of the death of the intestate, which was caused by the alleged negligence of the defendants' servants in navigating their steamship Franconia, under the following circumstances:

On the 17th of February, 1876, the Franconia, a German vessel, carrying German colors, commanded by a German master, and manned by a German crew, being bound from Hamburg to St. Thomas's, in the West Indies, with cargo, passengers, and mails, being then within three miles of the coast of England, south-south-east of Dover, through the negligence of her commander came into collision with and sank the Strathclyde, a British steamship, whereby the deceased and several other persons lost their lives.

(') See 19 Eng. Rep., 367 note.

The Franconia having been arrested at the suit of the owners of the Strathclyde, and certain actions being then pending against the owners of the Franconia at the suit of other persons, the following order was on the 11th of April, 1876, made in the suit in the Admiralty Court:

The judge, after hearing and by consent of counsel on both sides, decreed the vessel Franconia to be released in this action and in action 1876 D. No. 222, on payment into court by the defendants of an amount equal to £8 per ton of the *gross tonnage of the said vessel, with a sufficient sum to cover interest [174 and costs in both the said actions, and on the defendants giving bail to answer judgment in actions 1876 Q. No. 258 and 1876 C. No. 266, and undertaking through their solicitors either to give bail to answer judgment in any further actions for loss of life or personal injury that may hereafter be instituted by plaintiffs' solicitors against the said vessel, or to pay into court a further sum of £7 per ton of her gross tonnage, with a sufficient sum to cover interest and costs to answer such further actions,—without prejudice, however, to any objection that the defendants may hereafter raise as to the jurisdiction of this court in respect to any claim against the said vessel for loss of life and personal injury.

The defendants are a corporation carrying on business at Hamburg, in Germany.

The plaintiff in this action having obtained an order for service of the writ of summons on the defendants at Hamburg, a summons was taken out calling upon the plaintiff to show cause why that order should not be rescinded, on the ground that the cause of action did not arise within the jurisdiction of the courts of this country. The summons was referred by the judge to the court.

Benjamin, Q.C. (with whom were *Cohen*, Q.C., *G. W. Phillimore* and *Stokes*), for the defendants: The courts of this country have no jurisdiction in a personal action against a foreigner residing abroad, unless the cause of action arises within the jurisdiction. This is not an action *in rem*. The real question is whether the point is not determined by the decision of the majority of the judges in *Reg. v. Keyn* ⁽¹⁾.

[GROVE, J.: Although all the judges of this court were in the minority on that occasion, of course the decision binds us.]

The *ratio decidendi* there was that the Central Criminal Court had no jurisdiction to try a foreigner for an offence committed by him on board a foreign ship below low-water mark. In the course of his judgment in that case, Cockburn, C.J., says ⁽²⁾: “The strongest instance of legislation relating to foreign shipping is the provision in this part of the act ⁽³⁾, which, in s. 527, enacts that, ‘whenever any injury has, in any part of the world, been caused to any

⁽¹⁾ 2 Ex. D., 63.

⁽²⁾ 2 Ex. D., at p. 218.

⁽³⁾ Part iv of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104.

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property belonging to Her Majesty or to any of Her Majesty's subjects by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom or [175] *within three miles of the coast thereof, it shall be lawful to the judge of any court of record in the United Kingdom, or for the judge of the High Court of Admiralty, or in Scotland the Court of Session or the sheriff of the county within whose jurisdiction such ship may be, upon it being shown to him by any person applying summarily that such injury was probably caused by the misconduct or want of skill of the master or mariners of such ship, to issue an order directed to any officer of customs, or other officer named by such judge, requiring him to detain such ship until such time as the owner, master, or consignee thereof has made satisfaction in respect of such injury, or has given security, to be approved by the judge, to abide the event of any action, suit, or other legal proceeding that may be instituted in respect of such injury, and to pay all costs and damages that may be awarded thereon; and any officer of customs or other officer to whom such order is directed shall detain such ship accordingly.' In one respect this enactment is independent of the three-mile principle, as it extends the liability to seizure for damage done to British property by a foreign ship in every part of the world. But it is undoubtedly a strong assertion of dominion over foreign ships, and is a striking instance of the adoption of the three-mile principle. It may, however, be doubted whether the enactment would apply to a ship on a foreign voyage. The authority is to 'detain,' not seize, and would therefore seem only applicable to a vessel voluntarily seeking our waters otherwise than for the purpose of passage, and so bringing itself within our jurisdiction." That gives a remedy *in rem* against the ship for damage to property: the enactment is almost conclusive to show that what is not expressed is excluded from its operation. You may detain the ship, but you cannot sue the owners. Here, the ship has been detained. The fact of the defendants being a corporation is not relied on, seeing that it was decided by the Court of Queen's Bench in *Scott v. Royal Wax Candle Co.* (1) that Order XI, Rule 1, of the Rules of Court, 1875, which provides for service of a writ of summons out of the jurisdiction, applies to an action against a foreign corporation resident out of the jurisdiction,—a decision by which this court will no doubt hold itself bound.

(1) 1 Q. B. D., 404.

*[LORD COLERIDGE, C.J.: The main ground of my [176 judgment in *Reg. v. Keyn*(¹) was, that it was admiralty jurisdiction, and admiralty jurisdiction only. It really comes to the effect of this single section.

DENMAN, J.: Sect. 527 of the Merchant Shipping Act, 1854, is consistent with the Legislature supposing that an action would lie. The ship is to be detained "to abide the event of *any* action, suit, or other legal proceeding that may be instituted in respect of *such* injury,"—that is, injury to property. If this had been an action for injury to the ship, you would probably not have denied the right to detain the ship?]

No, because the owner in that case comes into court and submits to the jurisdiction, in order to obtain the release of the ship. No jurisdiction is given *in personam* unless the *persona* is within the limits of the jurisdiction. The ship was released on payment into court of a sum equal to £8 per ton on her gross registered tonnage: consequently, the ship and her owners are now beyond the reach of English process. The 24 Vict. c. 10, s. 7, enacts "that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship:" in *Smith v. Brown*(²), it was held by Cockburn, C.J., and Hannen, J. (Blackburn, J., doubting), that personal injury occasioned by the collision of two vessels does not come under the term "damage" as used in the above section; and that the Court of Admiralty has no jurisdiction to entertain a suit instituted under Lord Campbell's Act for personal injuries resulting in death occasioned by the collision of two vessels. Within what jurisdiction, then, was the alleged wrong done here? Not within that of the common law courts of this country, for, not one of the judges who took part in *Reg. v. Keyn*(³) doubted that the courts of common law have no natural or inherent jurisdiction below low-water mark; and not within the admiralty jurisdiction, because the Admiralty Court never had jurisdiction in a case of this sort. Order XI, Rule 1, therefore, gives no power to serve the writ of summons in this case at Hamburgh. [*Scott v. Lord Seymour*(⁴) was also referred to.]

Clarkson (Butt, Q.C., and R. E. Webster with him), for the *plaintiff: Jurisdiction in the order means ter- [177 ritorial jurisdiction, i.e., the jurisdiction of the Queen as Queen of England. The collision which resulted in the death of the intestate having taken place within three miles

(¹) 2 Ex. D., 63, 151.

(²) Law Rep., 6 Q. B., 729.

(³) 2 Ex. D., 63.

(⁴) 1 H. & C., 219; 32 L. J. (Ex.), 61.

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of the coast of England, the act done was within the limit of that jurisdiction. The existence of this territorial jurisdiction is the very foundation of s. 527 of the Merchant Shipping Act, 1854. The wrong complained of having been done within Her Majesty's dominion for any purpose, there can be no reason why the order for the service of the process upon the persons who did it should not be made out of the territory.

[LORD COLERIDGE, C.J.: The majority of the judges in *Reg. v. Keyn*⁽¹⁾ were of opinion that the territory of England stopped at low-water mark; and the Legislature has nowhere for this purpose extended it beyond that.]

LORD COLERIDGE, C.J.: This is a motion to set aside an order for the service of a writ upon the defendants, a foreign corporation, at Hamburgh. I am of opinion that the order must be set aside. It seems to me to be quite plain that the decision in *Reg. v. Keyn*⁽¹⁾ is binding upon all the courts. The *ratio decidendi* of that judgment is, that, for the purpose of jurisdiction (except where under special circumstances and in special acts Parliament has thought fit to extend it), the territory of England and the sovereignty of the Queen stops at low-water mark. The matter in respect of which this action is brought, therefore, happened beyond the jurisdiction of the Queen's courts; and therefore I think Order xi, Rule 1, does not enable a judge to order service of the writ out of the jurisdiction. I think further that s. 527 of the Merchant Shipping Act, 1854, has no application here. That section gives a special remedy under special circumstances, and those circumstances are absent in this case.

GROVE, J.: I am of the same opinion. The real question is whether this case is within s. 527 of the Merchant Shipping Act, 1854, or within Order xi, Rule 1, of the Rules of 1875. Now, the words of the section are very clear. They give power to certain persons, where injury has in any part of [178] the world been caused by *a foreign ship to any property belonging to any of the Queen's subjects, to detain the ship if found in any port or river of the United Kingdom, upon its being shown that the injury was probably caused by the misconduct or want of skill of the master or mariners, until the owner makes satisfaction or gives security to abide the event of an action in respect of such injury. It is enough to say that this is not an action brought in respect of an injury to property by the ship in question; and that alone appears to me to put this case out of that enactment.

(¹) 2 Ex. D., 63.

We cannot extend the remedy beyond what the statute gives. As to Order XI, Rule 1, that does not alter or extend the jurisdiction of the courts, but only gives them power to allow service of process abroad in respect of a cause of action arising in this country. That leaves the jurisdiction of the courts of law, whether High Court or Court of Admiralty, just as it was before. We are clearly bound by the decision of the majority in *Reg. v. Keyn* (').

DENMAN, J.: I am of the same opinion. My only reason for referring the matter to the court was, that the point was an important one, not that I entertained any doubt as to what the decision ought to be. I think Mr. Clarkson failed to point out any such distinction between a case of manslaughter and that of a civil action as would enable us to say that the decision of the majority of the court in *Reg. v. Keyn* (') is not a binding authority against him. The only case in which the courts can exercise the power given to them by Order XI, Rule 1, of the Rules of 1875, is, where the act or thing complained of is done within the jurisdiction. The case of *Reg. v. Keyn* (') clearly goes the length of holding that, for all purposes, apart from any express statutory provision, the moment you get beyond low-water mark you get beyond the jurisdiction within which the Queen's writs run. The order must be rescinded with costs.

Order rescinded.

Solicitors for plaintiff: *Gellatly, Son & Warton.*

Solicitors for defendants: *Stokes, Saunders & Stokes.*

(1) 2 Ex. D., 63.

[2 Common Pleas Division, 187.]

Feb. 1, 1877.

***THE TUNBRIDGE WELLS LOCAL BOARD, Appellants; [187
BISSHOPP, Respondent.**

Public Health Act, 1875 (38 & 39 Vict. c. 55)—Wilfully exposing an infected Person in a Public Street or place.

Sect. 126, subs. 2, of the Public Health Act, 1875 (38 & 39 Vict. c. 55), subjects to a penalty any person who while suffering from an infectious disorder wilfully exposes himself, without proper precautions against spreading the disorder, in any street or public place, &c., or who, being in charge of any person so suffering, so exposes such person.

A medical man in practice in Tunbridge sent a patient who was suffering from scarlet fever to the fever hospital there with a certificate, directing him to walk in the middle of the road, and not to talk to any one, but, in consequence of an alleged informality in the certificate, the patient was refused admission; whereupon the medical man walked with him through the streets of the town to the residence of the

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chairman of the local board, from whom after some delay he obtained an order for the man's admission to the hospital. He then returned with the patient to the police station to procure the ambulance to convey him thither.

Upon an information against the medical man for an alleged infringement of the statute, the justices were of opinion that it was not proved before them that the medical man "had charge of" the patient, that he had not wilfully exposed the patient in any street or public place "without proper precaution," and that he had made the best use of the means at his disposal to prevent the spread of the fever; and they refused to convict him :

Held, that their decision was right.

CASE stated by two justices of the peace for the county of Kent under 20 & 21 Vict. c. 43.

At a petty sessions holden at Tunbridge Wells, Kent, a complaint was preferred by the clerk to the local board (hereinafter called the appellants), being the local board of health of the town of Tunbridge Wells, against James Bisshopp (hereinafter called the respondent), under s. 126 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), for that the respondent, on the 24th and 25th days of June, 1876, at Tunbridge Wells, being a person in charge of one William Field, who was suffering from a dangerous infectious disorder, did unlawfully and wilfully expose the said William Field, without proper precaution against spreading the said disorder, in certain streets and public places there.

On the hearing of such complaint the appellants appeared by their solicitor, and the respondent by counsel; and, having heard the evidence adduced in support of the complaint and the respondent's defence thereto, the justices dismissed the complaint, stating the following case for the opinion of the court :—

1. It was proved that, on the morning of the 24th of June last, one W. Field, who was then suffering from scarlet fever, called at the police station at Tunbridge Wells, and produced to the constable on duty there a certificate signed by the respondent, a surgeon in practice at Tunbridge Wells, in the following form :

"I hereby certify that I believe *W. Field*, of *No. 7 Castle Street, High Street, Tunbridge Wells*, to be suffering from an infectious disease, and that it is desirable that the case should be isolated. I therefore request that *the case* may be removed to the temporary hospital *and the treatment continued* with less risk to others.

"J. Bisshopp."

In the copy, the italic alterations correspond with the additions to and alterations made by the respondent in the printed form of certificate issued by the appellants for the use of the medical man practising in the district.

The constable thereupon went in search of the sub-inspector of nuisances, who had charge of the ambulance, leaving Field sitting on the steps leading from the public footway into the Town Hall. Not being able to find the sub-inspector, the constable returned to the station and sent an assistant clerk from the appellants' office with Field to the residence of the sub-inspector.

2. The assistant clerk went with Field to the sub-inspector's residence, but the latter was still from home; and the assistant clerk, on examining the certificate produced by Field, declined to give him an order for the ambulance or for his admission into the hospital erected by the appellants for the reception of fever cases arising in the town of Tunbridge Wells, because the respondent had altered the printed form of certificate⁽¹⁾. The assistant-clerk then advised Field to go back to his lodgings until he got a proper certificate; and Field went away.

*3. On the evening of the next day, the 25th of [189 June, a constable on duty at the police station saw Field in the street, and the respondent at the same time came into the station and said that he had a patient there very bad with the scarlet fever, and that, after waiting an hour with him on Tunbridge Wells Common, near the residence of the chairman of the local board, he, the respondent, had procured from the chairman a letter ordering Field to be admitted into the fever hospital. The constable thereupon got out the ambulance, and Field was placed in it and taken to the hospital.

4. It was further proved on the part of the respondent that Field first called upon him on the 24th of June at his surgery at Tunbridge Wells, and the respondent, seeing that Field was suffering from scarlet fever, and hearing that he was lodging in a house in which were other lodgers, gave him the certificate above mentioned, and directed him to take it to the police station, and in going there to walk in the middle of the road, and not to talk to any one.

5. On the refusal of the assistant clerk of the appellants to order Field's admission into the fever hospital, Field returned to his lodgings, slept there that night, and on the next day, the 25th of June, went partly by railway and partly by road to Mayfield, where his sister was living; and, his sister having refused to take him in, Field walked back

(1) The only alteration was this,—Instead of the words "that I may continue the treatment with less risk to others," the certificate as altered ran, "and con-

tinue the treatment with less risk to others," the respondent himself not proposing to attend the case.

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to Tunbridge Wells and again went to the respondent's surgery.

6. The respondent then asked Field to go with him to the residence of the chairman of the local board, and they then walked together across the common to Mount Ephraim, and, after waiting an hour upon the common for the return of the chairman, the respondent went into the chairman's house and shortly afterwards returned to Field with a letter from the chairman containing an order for Field's admission into the hospital; and the respondent then walked with Field to the police station, where the latter was placed in an ambulance and removed to the hospital.

7. The medical officer of health for a large portion of West Kent, and the medical officer of health for East Sussex, were then called on behalf of the respondent, and stated that in their opinion the respondent had taken the better [190] course in sending Field to *the police station with a certificate for his admission to the fever hospital, rather than directing him to return to his lodgings.

8. Upon these facts, the magistrates were of opinion,—
1. That it was not proved before them that the respondent had charge of Field within the meaning of s. 126, subs. 2, of the Public Health Act, 1875,—2. That the respondent had not wilfully exposed Field in any street or public place without proper precaution against spreading the disorder,—
3. That, in all the respondent had done, he had acted to the best of his judgment, and had made the best use of the means at his disposal to prevent the spread of the fever from which Field was suffering. They therefore dismissed the complaint.

The question of law arising on the above statement was, whether or not, upon the facts proved, the magistrates were bound in point of law to convict the respondent. The court was solicited to remit the case to the magistrates with the opinion of the court thereon, or to make such other order as to the court might seem fit.

H. Matthews, Q.C., for the appellants: The question turns upon the construction to be put upon s. 126 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which enacts that "Any person who (1), while suffering from any dangerous infectious disorder, wilfully exposes himself, without proper precautions against spreading the said disorder, in any street, public place, shop, inn, or public conveyance, or enters any public conveyance without previously notifying to the owner, conductor, or driver thereof that he is so

suffering ; or (2), being in charge of any person so suffering, so exposes such sufferer ; or (3), gives, lends, sells, transmits, or exposes, without previous disinfection, any bedding, clothing, rags, or other things which have been exposed to infection from any such disorder ; shall be liable to a penalty not exceeding £5 ; and a person who, while suffering from any such disorder, enters any public conveyance without previously notifying to the owner or driver that he is so suffering, shall in addition be ordered by the court to pay such owner and driver the amount of any loss or expense they may incur in carrying into effect the provisions of this act with respect to disinfection of the conveyance." The question *is whether a medical man who walks through [191 the streets of a populous town with a patient infected with scarlet fever, is a person "in charge" of the infected person within the meaning of the act. What happened on the 24th of June may be disregarded : but that which took place on the 25th clearly amounts to an offence on the part of the respondent. He walked with Field from his surgery to the residence of the local board on Tunbridge Wells Common and thence to the police station, after waiting on the common one hour.

[DENMAN, J.: We will assume that he walked with him in the middle of the street, as he had desired Field to do the day before.]

In *Rex v. Burnett* (1), it was held that it is an indictable offence in an apothecary unlawfully and injuriously (2) to inoculate children with the small-pox, and while they are sick of it unlawfully and injuriously to cause them to be carried along a public street.

[DENMAN, J.: To bring the respondent within the penal consequences of the act, it must be shown that what he did was done "wilfully, and without proper precautions."

(1) 4 M. & S., 272.

(2) That is, "in an incautious manner, and likely to affect the health of the public:" per Lord Ellenborough. In passing sentence in that case, Le Blanc, J., observed that "the introduction of vaccination did not render the practice of inoculation for small-pox unlawful, but that in all times it was unlawful and an indictable offence to expose persons infected with contagious disorders, and therefore liable to communicate them to the public, in a public place of resort."

See also *Rex v. Vontandillo* (4 M. & S., 73), where the defendant was indicted for

causing patients inoculated with the small-pox to be brought to his surgery whilst infected with the disease.

And see *Best v. Stapp*, in a note in Glen on Public Health, 10th ed., 98, where a lodging-house keeper at Eastbourne recovered (and retained) a verdict for £120 against a lodger who knowingly introduced into the plaintiff's house children infected with scarlet fever, in consequence of which the plaintiff lost four of his own children, and was put to expense for medical attendance and their funerals.

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What precautions has this gentleman failed in? He could not have taken him along the streets in a cab.]

He might have taken him early in the morning or late at night. It is clear the patient himself would be liable: and the person who bids him go or goes with him, and therefore has charge of him, is equally liable.

192] *[DENMAN, J.: Can a man be said to "expose" or to be "in charge of" one who is of full age and a free agent?]

A man weakened by disease may fairly be said to be exposed by the person who is attending upon him: the statute cannot be limited to legal control, or it will become a dead letter.

Keogh, contra, was not called upon.

GROVE, J.: I am of opinion that the justices in this case did quite right. There is nothing upon the face of the case to show that the respondent wilfully exposed the sufferer in a public street or place without proper precautions against spreading the disorder, within the meaning of the statute. The material facts are, that the respondent, a surgeon in practice in Tunbridge Wells, finding a man suffering from scarlet fever, sent him with a certificate to the constable on duty at the police station in order that he might be conveyed in the ambulance to the fever hospital, telling him to walk in the middle of the road, and not to speak to any one. The assistant clerk to the local board refused to give an order to the sub-inspector of nuisances for the patient's admission into the hospital, on the ground that certain blanks in the certificate had not in his judgment been properly filled up, and told the man to go back to his lodgings until he got a proper certificate. What occurred on that occasion was clearly not the fault of the medical man. On the following day the respondent took the patient to the house of the chairman of the local board, who after considerable delay gave him a letter ordering his admittance into the hospital, where he was at last received. The medical man seems to have conducted himself with great humanity, and I am at a loss to see how he could have done better than he did. The magistrates were of opinion that it was not proved before them that the respondent "had charge of" the sick man within the meaning of s. 126, subs. 2, of the Public Health Act, 1875. That might possibly be arguable: but it is immaterial, because I am of opinion that the magistrates were quite right in the other two findings, viz., that the respondent had not wilfully exposed the sufferer in any

street or public place without proper precautions against spreading the disorder; and that in all he had done he had acted to the best of his judgment, and had made the best use *of the means at his disposal to prevent the [193 spread of the fever. It seems to me that all the evidence points that way.

DENMAN, J.: The only question presented to us by the justices is, whether or not, upon the facts proved, they were bound to convict the respondent. I must say I entertain great doubt whether any question of law is raised at all. In the first place, the justices state that they were of opinion that it was not proved before them that the respondent had charge of Field within the meaning of s. 126, subs. 2, of the statute. Now, there may be cases in which the patient may be utterly unable to take care of himself, and where a medical man may so conduct himself as to justify the justices in finding that he had him in charge. But it by no means follows that merely walking by the side of a man who is able to walk alone will bring him within that category. I cannot therefore say that the justices were bound to hold that the respondent had charge of Field; nor am I prepared to say that their decision upon this point was unreasonable. With respect to the exercise of proper precautions, I think that involves a question of fact. The clause in question refers to two cases,—1. that of a person wilfully exposing himself without proper precautions against spreading the disorder,—2. that of a person who, being in charge of any person so suffering, so exposes the sufferer. I think the magistrates would have been well justified in finding that there had been no exposure at all. The poor man having been improperly refused admission to the hospital on the first occasion, the doctor walked with him the next day to the residence of the chairman of the local board. Whether or not he did so without proper precautions against spreading the contagion was a question of fact. It appears that on the first day he gave the patient good advice; and there is nothing to show that he was guilty of any want of caution when he himself went with him. The justices have found that the respondent did not expose Field without proper precaution against spreading the disorder, and that he made the best use of the means at his disposal to prevent the spread of the fever. That is a finding of fact, upon which I entirely agree with them. I doubt whether any question of law is involved in the case at all.

**Keogh*, for the appellant, asked for the costs as [194 well of the proceedings below as of the appeal.

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GROVE, J.: The master tells us that we have no jurisdiction over the costs below. We can, therefore, only deal with the costs of the appeal.

Decision affirmed, with costs.

Solicitors for appellants: *Halse, Trustram & Co.*, for W. C. Cripps, Tunbridge Wells.

Solicitors for respondent: *Hughes, Hooker, Buttanshaw & Murton.*

As to criminally exposing an infected person so as to endanger the health of the public, see 1 Bish. Cr. Proc. (2d ed.), § 524; 1 Bish. Cr. Law (6th ed.), §§ 489-494; Bish. St. Crimes, § 20; 2 Whart. Cr. Law (7th ed.), § 2386-8.

As to the powers of a board of health see 1 Dillon's Munic. Corp., (2d ed.), §§ 93-6, 303-328; 2 id., §§ 757, 775; 2 Monthly Western Jur., 218; Seavey v. Preble, 64 Maine, 120; People v. Roff, 3 Parker, 216; Health, etc., v. Knoll, 70 N. Y., 530, 4 Abb. N. C., 97; Metropolitan, etc., v. Heister, 37 N. Y., 661; Rider v. Fuller, 13 Hun, 669; Gregory v. R. R. Co., 40 N. Y., 273; Bates v. District Columbia, 1 MacArthur, 433; Salem v. Eastern, etc., 98 Mass., 431; Slotts v. Rockingham Co., 53 N. H., 598; McIntyre v. Pembroke, 53 N. H., 462; State v. Street, etc., 36 N. J. Law, 283; Hutton v. Camden, 39 N. J. Law, 122; Yates v. Milwaukee, 10 Wall., 497; Richmond v. Smith, 15 Wall., 429; Slaughter House Cases, 16 Wall., 36, 1 Wood's C. C. Rep., 21, Id., 50; Klais v. Pulford, 36 Wisc., 587; Kollock v. City, 37 Wisc., 348.

The owner of a dwelling house who, knowing that it is so infected with the small-pox as to endanger the health of the occupants, leases it, for the purposes of habitation, without disclosing the fact, to one who is ignorant of its condition, and who, without contributory negligence on his part, by reason of the state of the house, is attacked by the disease, is liable to an action: Minor v. Sharon, 112 Mass., 477; Cesar v. Kaurtz, 60 N. Y., 229.

When a landlord knows that a cause exists which renders his premises unfit for occupation, it is a wrongful act on his part, amounting to *fraud*, to rent them without giving notice of their condition: Wallace v. Lent, 29 How. Pr., 289, 1 Daly, 481.

See also Seavey v. Preble, 64 Maine, 120.

The question whether vaccination would, under all the circumstances of the case, have been a proper precaution for the lessor to have taken is for the jury: Minor v. Sharon, 112 Mass., 477.

A person has no right, even under the direction of the president of a board of health, to place a family infected with small-pox in an unoccupied dwelling house belonging to another, without the consent of the owner, or authority from the board of health of the town, although such removal of the family may be necessary to prevent the spread of the disease: Beckwith v. Sturtevant, 42 Conn., 158.

See authorities cited by counsel, pp. 160-2.

So if a house ready furnished, be at the time of its letting greatly infested with bugs, it has been held there was an implied *warranty* as to its fitness for habitation, and the tenant could quit without notice: Smith v. Marrable, 11 Mees. & Welsb., 5.

See, however, cases cited in note to Johnson & Co.'s Am. ed.; Forsyth's Hortensius, 236 note.

The rule of an implied warranty of fitness does not apply to an ordinary letting of a house for habitation: Kerr on Frauds (1st Am. ed.), 104; Hart v. Windsor, 12 Mees. & Welsb., 68; Dyett v. Pendleton, 8 Cow., 728, reversing 4 id., 581; Etheridge v. Osborn, 12 Wend., 529; Westlake v. De Graw, 25 Wend., 669; Keates v. Cadogan, 10 C. B., 591; Chapman v. Gregory, 34 Beav., 250; McGlashan v. Tallmadge, 37 Barb., 314-5; Dutton v. Gerrish, 9 Cush., 89.

Nor to the case of a pasture let by the owner, over which had been accidentally spread, without his knowledge, a poisonous substance which kills the cattle feeding in the pasture: Sutton v. Temple, 12 Mees. & Welsb., 52.

It has been held to be sufficient evidence to justify a submission of the

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question of eviction to a jury whether the keeping of lewd women in another part of a house leased is not an eviction: *Dyett v. Pendleton*, 8 Cowen, 727.

But see *Dewitt v. Pierson*, 112 Mass., 8; *Vanderbilt v. Persse*, 3 E. D. Smith, 428, 430; *Edgerton v. Page*, 20 N. Y., 281; *Gretton v. Smith*, 33 N. Y., 249; *McGlashan v. Tallmadge*, 37 Barb., 315.

But the *mere fact* that one tenant keeps a bawdy house in one part of a

house is not an eviction of another tenant: *Dewitt v. Pierson*, 112 Mass., 8.

It has been held not to be a justification for a trespass by the landlord in forcibly entering and dispossessing a tenant who keeps a bawdy house: *Miller v. Fernan*, 37 N. J. Law, 55.

It is no defence to an action for rent that a house had been occupied as a bawdy house, and that the landlord knowing the fact at the time of the renting concealed it: *Meeks v. Bowerman*, 1 Daly, 99.

[2 Common Pleas Division, 194.]

Dec. 7, 1876.

[IN THE COURT OF APPEAL.]

GRIFFITH and Wife v. TAYLOR.

THATCHER v. TAYLOR.

Action for False Imprisonment—Right to Notice of Action under ss. 103, 113, of 24 & 25 Vict. c. 96—"Found committing"—"Immediately apprehended."

In an action for false imprisonment, defendant set up as a defence that he had had no notice of action, to which he was entitled under s. 113 of 24 & 25 Vict. c. 96: for that he had caused plaintiff to be arrested under s. 103, believing he had found her committing a felony. The jury found that plaintiff had not committed the felony, but that defendant *bona fide* believed, and on reasonable grounds, in the existence of facts which would have justified him in acting as he had done. On this finding the verdict was entered for defendant. Plaintiff had not been apprehended on the spot where defendant believed he had found her committing the felony, and the question, whether or not she had been "immediately apprehended," had not been left to the jury:

Held, that this was a question of fact for the jury which ought to have been left to them, and that there must therefore be a new trial.

THESE were two actions tried together, arising out of the same circumstances, the plaintiff in the second action being the sister of the female plaintiff in the first action; the pleadings in the two actions were identical.

First count, for false imprisonment, in giving the female plaintiff into custody of a policeman on a charge of felony, and causing her to be imprisoned at a police station until she was dismissed by the inspector, by reason of the defendant not appearing to prosecute.

*Second count, for malicious prosecution of the [195 female plaintiff before justices, on a charge of stealing a box of eggs.

Pleas. To the first count, 1. Not guilty by statute (24 & 25 Vict. c. 96, ss. 1-4, 91-99, 103, 113).

2. Setting out all the facts, and justifying on the ground that the defendant had reasonable and probable cause for

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suspecting the plaintiff to be guilty of having stolen the box of eggs.

3. To the second count, not guilty, and other pleas which it is unnecessary to give.

At the trial before Brett, J., at the sittings in Middlesex after Michaelmas Term, 1874, it appeared that the defendant lived at Reading. On an evening in July, 1874, he was about to proceed by the 9 p.m. train from Oxford to Reading, and he left a small deal box containing eggs on the counter of the book stall on the platform at the railway station, while he went into the refreshment room; on his return the box was gone, and as the train was about to start, he was obliged to get into the train without searching for it. The first place at which the train stopped was Reading, where he got out and went along the train with the guard, and found his box under the seat in a third class carriage in which the two female plaintiffs were seated. The guard went for the station master; while he was gone, the plaintiffs, as the defendant swore, moved the box and endeavored to conceal it with their petticoats; he took the box away, charging them with having stolen it, and requested the station master, who had come to the carriage with the guard, to take them into custody. The station master declined to do so; and in the meantime the male plaintiff and four other male companions had returned from the refreshment room to the carriage, and the train started, carrying the plaintiffs to London, the defendant remaining at Reading. He communicated immediately with the police at the Reading station, and they at his instigation telegraphed to the police at Paddington station (the train not stopping between Reading and Paddington) to take the two female plaintiffs into custody, describing them and the carriage they were in, and what they were charged with, and saying the prosecutor would come up by the "fast" train in the morning; this, however, was read "first" train. The plaintiffs were arrested by the police in [196] London, and kept *in the police station till the first train, the mail train, arrived from Reading, at 4.30 a.m., and the defendant not being in it, the police inspector let the plaintiffs go, having first ascertained that they had given a true address. They were a day or two afterwards arrested under warrants, and taken before the magistrates at Oxford. The charge was dismissed by the bench, but not unanimously. No notice of action had been given.

The counts for false imprisonment were abandoned in the course of the trial.

The jury, in answer to questions by the judge, stated

that they were unable to agree as to whether a felony had been committed; but they found that the plaintiffs had not stolen the box, that the defendant *bona fide* believed that the plaintiffs had stolen the box, and believed *bona fide*, on reasonable grounds, facts, which, if true, would have justified him.

A verdict, by consent, was taken in each action for the plaintiff on the second plea, with nominal damages; and on the first plea the verdict was directed to be entered for the defendant, on the ground that, on the finding of the jury, he was entitled to notice of action⁽¹⁾.

A rule for new trial was afterwards obtained, on the ground, *inter alia*, of misdirection, that the judge did not sufficiently direct the jury as to the meaning of the words "found committing," so as to enable them to decide whether, upon the facts, the defendant was entitled to notice of action under the statute. That the *judge misdirected the [197 jury in telling them that "if such a state of things existed as gave the defendant reasonable and probable cause to suspect and believe, and if he did honestly and *bona fide* believe, that the plaintiffs had stolen the box, the defendant would be entitled to the verdict;" and the judge ought to have told the jury that, to entitle the defendant to notice of action, they must find that he honestly and *bona fide* believed the plaintiffs were found committing the offence for which he gave them into custody.

The rule was argued on the 11th of Jan., 1876, before Lord Coleridge, C.J., and Brett and Archibald, JJ., who took time to consider; and on the 28th of April, 1876, the judgment of the court was delivered by Lord Coleridge, C.J., making the rule absolute⁽²⁾.

(1) 24 & 25 Vict. c. 96 (An act to consolidate and amend the Statute Law of England and Ireland relating to larceny and other similar offences), s. 103: "Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant by any person, and forthwith taken, together with such property, if any, before some neighboring justice of the peace, to be dealt with according to law; . . ." s. 113. "All actions and prosecutions to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within

six months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; . . ."

(2) After stating the pleadings, the facts, and the findings of the jury, Lord Coleridge, C.J., proceeded: Till almost the very end of the argument before us, we were under the impression, an impression shared by my learned Brother who tried the case, that the arrest was a continuing one; that the plaintiffs had been bailed and had appeared at Oxford in consequence of the arrest

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The defendant appealed.

The grounds of appeal were: That there was no misdirection by *the judge at the trial leading to the verdict for defendant; and that the Common Pleas Division were in error in holding that defendant could not be protected by s. 103 of 24 & 25 Vict. c. 96, and the other sections relied on in the plea, because plaintiffs were not kept in arrest until they were brought up for examination before a magistrate under the circumstances stated in the evidence.

Dec. 6. *Jelf* and *Bosanquet*, for the defendant: It cannot be now disputed, that, upon the latest authorities, in order to entitle the defendant to notice of action under s. 113 of 24 & 25 Vict. c. 96, it is sufficient that he acted under a *bona fide* belief in the existence of circumstances which, if they had really existed, would have justified him in arresting the plaintiffs under s. 103⁽¹⁾. The rule was originally obtained in the Court of Common Pleas on the ground that the jury had not found that the defendant believed that the plaintiffs were found committing the offence. The jury, in consequence of the way the judge left the case to them, found that the defendant *bona fide* believed that the plaintiffs had stolen the box, and that his belief was founded on reasonable grounds. This was more than was necessary, as it has been determined in several cases that the *bona fide* belief is sufficient. But if the defendant *bona fide* believed that the plaintiffs stole the box, he must have believed that they

which took place at Paddington on the arrival of the plaintiffs from Reading. This gave rise to a lengthened and elaborate argument on the true construction of the words "found committing" in s. 103 of 24 & 25 Vict. c. 96, whether the conduct of the defendant was within the protection of that section, and whether therefore he was entitled to notice of action under s. 113 of that statute. But it now appears that the arrest upon which the plaintiffs were carried to Oxford and there examined, and in respect of which it was suggested that the provisions of s. 103 had been substantially followed, was entirely distinct from and unconnected with the first arrest at Paddington and the detention in the police station there, for which the action was brought, and to which alone the language of the first count of the declaration is applicable. This could not be denied upon reference to the dates of the warrants upon

which the plaintiffs were taken to Oxford; indeed it was at once, when mentioned, properly conceded by the plaintiffs' counsel. It is indeed unfortunate that the attention of my learned Brother, at the trial, and that our attention, on the argument, was not called to the true state of facts. As matters now stand, however, it becomes unnecessary, and indeed impossible, for us to discuss questions which do not arise, and cannot arise, upon the facts of this case. The misapprehension to which I have adverted, in point of fact led naturally, indeed inevitably, to misdirection in point of law. No such justification as the jury have in fact found, and no such considerations as they were directed to entertain, really existed on the facts of the case; and on this short but decisive ground the rule must be absolute for a new trial in both cases.

⁽¹⁾ *Ante*, p. 196.

were found committing the felony: for the box was in their possession at Reading, and consequently if they took it at Oxford, as the defendant must have believed, there was a continuing *asportavit* at Reading. The judgment in the court below, however, did not proceed on any such ground as this, but on the ground, apparently, that, as the taking of the plaintiffs before the magistrates at Oxford was not in consequence of their apprehension at Paddington, but under warrants, there had not been a taking "forthwith" before a magistrate, and consequently s. 103 had not been pursued, and the defendant could not be entitled to the verdict on the first plea. That, it is submitted, is clearly erroneous; if the defendant did all he could, and all he ought, up to the arrest, it was not his fault that the apprehension proved abortive; that was the fault of the police in allowing the plaintiffs to go without taking bail.

*[COCKBURN, C.J.: It is difficult to understand the [199 ground of the judgment of the Common Pleas Division, but if that is the ground, I must say I cannot agree with it. It was the defendant's business to apprehend, or cause the plaintiffs to be apprehended, and the business of the police to take them before the magistrates. But there is a more formidable objection, to my mind, in the defendant's way—Was the apprehension of the plaintiffs "immediate?"]

The defendant made hot pursuit, which is all that "immediate" means. It is sufficient if a man acts reasonably within the statute; he need not follow it to its very letter: *Read v. Coker* ⁽¹⁾. The station-master refused to take upon himself to arrest the plaintiffs at Reading; no policeman was on the spot, and the defendant could not have arrested them himself, and the train went on. He immediately telegraphed to Paddington, the train not stopping at any previous station; which is precisely as if he had raised a hue and cry, and pursued the plaintiffs. The pursuit here was commenced immediately on the commission of the offence, not as in *Downing v. Capell* ⁽²⁾.

D. Seymour, Q.C., and *Culpepper*, for the plaintiffs: The question which ought to have been left to the jury was whether the defendant *bona fide* believed that the plaintiffs were found committing the offence: *Roberts v. Orchard* ⁽³⁾. "Found committing" must be construed strictly: *Horley v. Rogers* ⁽⁴⁾. The felony, if committed at all, must have been committed at Oxford, so that the plaintiffs could not be found committing it at Reading; and though it has been

⁽¹⁾ 13 C. B., 850; 22 L. J. (C.P.), 201.

⁽³⁾ 2 H. & C., 769; 33 L. J. (Ex.), 65.

⁽²⁾ Law Rep., 2 C. P., 461.

⁽⁴⁾ 2 E. & E., 674; 29 L. J. (M.C.), 140.

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held that there need not be a reasonable ground for the belief, still there must be some facts on which the belief can be founded: *Chamberlain v. King* ⁽¹⁾.

[COCKBURN, C.J.: I question whether the finding of the jury as to this is not sufficient, looking at the facts. The jury have found that the defendant believed the plaintiffs to have stolen the box; and if they stole it the *asportavit* was continuous, and amounted to a fresh taking at Reading (see 1 Hale's P. C., 507-8), and if so, the defendant might well have believed that they were found committing the offence.]

200] *But then there was no immediate arrest at Reading: and there the box was taken away from them. It might not be convenient to the defendant to make the arrest himself, and possibly he acted with a wise discretion in not attempting it; but the offender must be taken *ipso facto* committing the offence, and forthwith taken before a magistrate, *Rex v. Curran* ⁽²⁾; neither of which things was done in the present case.

Dec. 7. *Bosanquet*, in reply: It is sufficient to entitle the defendant to notice of action that he *bona fide* believed that the plaintiffs were committing the offence, even if they really were not guilty.

[BRAMWELL, J.A.: The old case of *Cann v. Clipperton* ⁽³⁾ is to that effect.]

As to immediate apprehension, if the offender escapes and is arrested after fresh pursuit, that is sufficient. In *Hanway v. Boulton* ⁽⁴⁾, Tindal, C.J., said: "The words of the present statute" [7 & 8 Geo. 4, c. 30, s. 28, which are essentially the same as those of the present act] "must not be taken so strictly as to defeat its reasonable operation. Suppose a party seen in the act of committing the crime were to run away and immediate and fresh pursuit to be made: I think that would be sufficient. So in this case, the party is actually seen in the commission of the act complained of; as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required; and that being the case, I think it must be treated as an immediate apprehension." . . . So, in the present case, as soon as possible the police were called in and the plaintiffs arrested.

COCKBURN, C.J.: I am of opinion that the order of the Common Pleas Division for a new trial should be affirmed, though not on the grounds on which that court is said to

⁽¹⁾ Law Rep., 6 C. P., 474.

⁽²⁾ 3 C. & P., 397.

⁽³⁾ 10 A. & E., 582.

⁽⁴⁾ 1 Mood. & Rob., 15, 18-19.

have proceeded; I confess, however, I do not quite understand the judgment.

The question turns on ss. 103 and 113 of 24 & 25 Vict. c. 96. [The Lord Chief Justice read the two sections.] According to the latest authorities on the subject of notice of action for *anything done in pursuance of a statute, the law is [201 that in order to entitle a party to notice he must have acted under the *bona fide* belief in the existence of circumstances which, if they had really existed, would have amounted to a justification. The decision in the present case turns on two separate and distinct parts of s. 103. The first relates to the person arrested having been "found committing" an offence against the statute; and as to that part of the case the question of the *bona fide* belief of the defendant is essential. The second part relates to the "immediateness" of the apprehension, and there the question turns, not on what was in the mind of the defendant, but on what was actually done by him. On the one question, *bona fide* belief in a certain state of facts is enough, although no felony was actually committed; on the other, it is necessary, in order to obtain the statutory protection, to show that the defendant acted in conformity with the act. While in the one case misapprehension of fact, if *bona fide* entertained, will not disentitle him to the protection, in the other misapprehension of the law, that is, of what the statute enables him to do, will disentitle him. If the defendant acted under a *bona fide*, though mistaken, belief that the persons arrested had been found committing the offence, he would be so far within the protection of the statute; but if he acted under a mistake of the meaning of the words "may be immediately apprehended," and caused the plaintiffs to be arrested under circumstances which would make the apprehension not immediate, he would not be protected. That the defendant *bona fide* believed that a felony had been committed I cannot doubt, and the circumstances were well calculated to engender that belief; and if a felony had been committed, he would have been justified in apprehending the plaintiffs; but the question is, whether what he did, acting under the *bona fide* but mistaken belief that they had committed a felony, was within the statute. If a felony had been committed, I think it clear the plaintiffs would have been found committing the offence at Reading. It was, indeed, argued for the plaintiffs that the offence was committed, if anywhere, at Oxford, as the box was left by the defendant on the platform there; that it was taken thence by some one and put into the carriage in which the

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202] plaintiffs were, where it was *found at Reading. No doubt, if the box was feloniously taken at Oxford, and put into the carriage, the offence was complete at Oxford, as then there must have been an *asportavit* there, any removal however slight amounting to an *asportavit*. But if a stolen chattel is carried over a considerable space by the thief, the *asportavit* continues so long as the removal continues, and the taking, in point of law, continues too. So that, if the plaintiffs did steal the box at Oxford, though the defendant would have been justified in arresting them there, yet, as they were still carrying the box away, the defendant would have been justified in arresting them at Reading; for in law and in fact they would have been there found committing the offence of larceny. The jury, however, have found that the plaintiffs did not commit the offence, so that their actual guilt was negatived; but then, as the jury were fully justified in finding that the defendant *bona fide* believed (and on reasonable grounds) that the plaintiffs had stolen the box, and consequently were committing a felony at Reading, he was so far within the protection of the statute.

But then we come to what the defendant actually did; and on this part of the case it becomes necessary to say whether the apprehension of the plaintiffs was immediate. Now s. 103, although the Legislature may have had cases of misdemeanor more immediately in view, is large enough to include, and clearly must be taken to include, cases of felony; and when an offence within the statute is committed, any person found committing the offence may be apprehended at once by any person without warrant,—if it be done on the spot or “immediately,”—and at once taken before a magistrate. But although “immediately” is a strong word, and must, I think, be taken to mean “then and there,” still it must receive a reasonable construction, and if arrest on the spot is impossible, and can only be effected by pursuit, if the pursuit is immediately set on foot and so the party is arrested, then I think he would be “immediately apprehended” within the meaning of the section, although the apprehension took place not on the spot but at some distance from it. But then, in every case it must be a question of fact whether the apprehension is immediate or not. In the present case, if by application to the station-master the defendant could have stopped the train, and the 203] police would have *been called in, and the plaintiffs arrested at once, and the defendant had preferred to let them go on, and then sent after them and had them apprehended in London, merely because it was a mode of pro-

ceeding more convenient to himself, the apprehension would not have been immediate. On the other hand, if the apprehension of the plaintiffs at Reading was, under the circumstances, impossible, and the defendant had himself gone in pursuit,—if, for instance, he had got into the same train, or gone up by a faster train, and so apprehended the plaintiffs on their arrival in London, or if he had deputed some other person to go and do this for him, and that person had arrested the plaintiffs, I am far from saying that the apprehension would not have been immediate. So possibly the use of what may be called the equivalent means, which science afforded him, of the electric telegraph, would be sufficient, provided he availed himself of the first opportunity to effect the arrest. I am, however, far from wishing to be understood as laying it down that the circumstances of the present case justified the course which the defendant pursued. We are not called upon to decide whether the arrest was immediate. When the circumstances are intricate, the question becomes one of degree, and must be determined as a question of fact, and as such is clearly for the jury. We therefore cannot take upon ourselves to say the apprehension was immediate: we can only say that “immediately” ought to be liberally interpreted. But the question was not left to the jury, and we are therefore agreed that there must be a new trial; not on the ground put forward by the plaintiffs’ counsel, that the jury have not found that the defendant believed that the plaintiffs were found committing the larceny, but on the ground that it is left uncertain whether the defendant may or may not have effected the “immediate” apprehension of the plaintiffs, so as to bring himself within the protection of the statute.

BRAMWELL, J.A.: I also think that this appeal ought to be dismissed, and on the same grounds. I will add nothing to what the Lord Chief Justice has said as to the plaintiffs having been found committing the offence. Supposing a felony was committed by taking the box at Oxford, the plaintiffs were still committing the offence at Reading, and were found committing it.

*On the other question, it is extremely difficult to [204 lay down any general rule, it is a question of degree, whether the pursuit and apprehension of the offender are immediate or not. I am by no means sure whether the judge ought not to have told the jury that the plaintiffs were not immediately arrested: for the offence had ceased to be committed as soon as the box was taken from them at Reading. I am not sure that it makes any difference in point of law, when

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the arrest is not on the spot at which the person is found committing the offence, whether it was because the person arresting could not, or because he would not, make the arrest on the spot. If the defendant had at first said he would not arrest the plaintiffs, and then had changed his mind and had telegraphed to London to arrest them, that could not have been said to be an immediate arrest. But I agree with the Lord Chief Justice, if this is not a matter of law to be ruled in favor of the plaintiffs, it is certainly not a matter of law to be ruled in favor of the defendant. The question whether there was an immediate apprehension is a question for the jury, which was not left to them, and the consequence is inevitable. There must, therefore, be a new trial; and, in my opinion, the proper course would be that it should be left to the jury to find the facts, reserving leave to either party to move to enter judgment.

AMPHLETT, J.A.: I am of the same opinion, and am much of the same opinion as my Brother Bramwell as to the question to be left to the jury; I only wish to say that as the case must go back for a new trial, I think it ought to be left to the jury to find the exact circumstances as to what occurred at Reading, and as to the apprehension of the plaintiffs in London. If there could, as matter of law, be an immediate apprehension in London for an offence committed in Reading, I do not think the facts are so before us as to enable us to decide this point. For my own part, as a matter of law, I should have said it was impossible that there should be an apprehension in London for an offence committed at Reading, so as to enable the jury to say that the defendant had *bona fide* believed that the plaintiffs had been found committing an offence and had had them immediately arrested. I think the intention of the statute must have been that the arrest should be then and there; 205] *and if the offender gets away, or is not taken in immediate and hot pursuit, however shortly afterwards, his arrest cannot be considered as immediate within the statute. As I have said before, the case must go back, and I think the exact facts should be found.

Order affirmed.

Solicitor for plaintiffs: *E. M. Chubb.*

Solicitor for defendant: *C. Mallam*, for T. & G. Mallam, Oxford.

See 18 Eng. Rep., 358 note.

A policeman has no authority to arrest, without warrant, a person violat-

ing a city ordinance, unless expressly authorized so to do by the city charter, or unless such violation of the ordi-

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nance is accompanied by a breach of the peace: *Hennessey v. Connelly*, 13 Hun, 173, distinguishing *Buttolph v. Blust*, 5 Lansing, 84.

See 20 Eng. R., 561 note.

To justify a complaint against one for burglary and causing his arrest on a bare suspicion, from the fact of his having come into the defendant's store the evening before the burglary and

paid a small bill, and whose character is good, the person making the complaint and causing the arrest should use reasonable efforts to learn and know the true character of the person charged and arrested, and if he does not this may be considered on the trial of an action for malicious prosecution growing out of the arrest: *Hirsch v. Feeney*, 83 Ills., 548.

[2 Common Pleas Division, 205.]

Jan. 26, 1877.

[IN THE COURT OF APPEAL.]

ROURKE V. THE WHITE MOSS COLLIERY COMPANY (').

Master and Servant—A. not liable for the Negligence of his Servant while employed under the Control of B.

The defendants, having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard, W. to find all labor, the defendants to provide and place at the disposal of W. the necessary engine power, ropes, and hoppets, with an engineer to work the engine (who was employed and paid by the defendants), the engine and engineer to be under the control of W. The plaintiff, who was one of the men employed and paid by W., while working at the bottom of the shaft was injured by the negligence of the engineer:

Held, affirming the judgment of the Common Pleas Division, that though the engineer remained the general servant of defendants, yet being under the orders and control of W. at the time of the accident, he was acting as the servant of W., and not of defendants, who were therefore not liable for his negligence.

APPEAL from the decision of the Common Pleas Division, making absolute an order to enter judgment for defendants (').

The action was for injuries caused to plaintiff by the negligence of defendants' servants; and was tried before Lush, J., at the Liverpool winter assizes, 1875.

The defendants were the owners of a colliery, and had begun sinking a pit or shaft, for which purpose they employed workmen (among whom was the plaintiff), and had erected a steam engine near the mouth of the shaft, and employed men to drive it. Having sunk some depth, they entered into an agreement with Roger Whittle to carry on the work for them. The following *were the terms of the [206 agreement, &c., detailed by the managing director of the defendant company in answer to interrogatories:—

"3. The sinking and excavating were executed by Roger Whittle, contractor, under a verbal contract, at a certain price per yard, Whittle to find and provide all labor neces-

(') Affirming 18 Eng. Rep., 191.

(*) 1 C. P. D., 556; 18 Eng. R., 191.

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sary for such sinking, and the company to provide and place at the disposal of Whittle the necessary engine power, ropes, and hoppets, with two engineers to work the engine, one for the day and one for the night, such engineers, engine, and hoppets being under the control of the contractor.

"4. The engine, pulley, and hoppet which were used to bring to the surface the stuff excavated in the shaft were the property of the defendants, but were at the time of the accident under the control of the contractor.

"5. Ellis Lawrence, engineer, was in charge of the engine, pulley, and hoppet on the 27th of October, 1874, under the control of Whittle. Lawrence was employed by the defendant company, who, on the 7th of November, paid him for his work from the 21st of October to the 3d of November."

On the 27th of October, 1874, the plaintiff, being one of the men employed and paid by Whittle, was working at the bottom of the shaft, when, owing to Lawrence, the engineer, falling asleep, the engine was not stopped at the proper time, and the hoppet was overturned, and fell with its contents on the plaintiff below, and injured him severely.

A verdict was found for the plaintiff for £300, with leave to move to enter judgment for the defendants, if the court should be of opinion that the defendants were not liable to the plaintiff for Lawrence's negligence.

The Common Pleas Division ordered judgment to be entered for the defendants (¹).

The plaintiff appealed.

L. Temple, Q.C., and *Gully*, for the plaintiff: The Common Pleas Division decided this case on the ground that the plaintiff and Lawrence were fellow servants; but that is not 207] so. There *must be not only a common employment but a common employer. The plaintiff was clearly the servant of Whittle, for he was hired and paid by Whittle, whereas the engine-driver was as clearly the servant of the defendants, being hired and paid by them. *Wiggett v. Fox* (²) was the case chiefly relied on by the Common Pleas Division; but there the defendants had the control of the whole work. The facts are within the principle of *Abraham v. Reynolds* (³), in which case, although the work was all done for the defendants, yet the defendants were held liable, as the plaintiff was not either hired or paid by the defendants. *Murray v. Currie* (⁴) was also relied on for the defendants; but there the plaintiff was in the employ of the

(¹) 1 C. P. D., 556.

(²) 11 Ex., 832; 25 L. J. (Ex.), 188.

(³) 5 H. & N., 143.

(⁴) Law Rep. 6 C. P., 24.

stevedore, and the defendant, the shipowner, had left everything to him; and, though the person guilty of the negligence was one of the defendant's crew, yet he was employed and paid for the particular work by the stevedore. [They also referred to *Bartonshill's Coal Co. v. Reid* ⁽¹⁾, *Dalyell v. Tyrer* ⁽²⁾, and *Morgan v. Vale of Neath Ry. Co.* ⁽³⁾.]

Herschell, Q.C., and *M'Connell*, for the defendants: First, the plaintiff and Lawrence were in the common employment of the defendants within the rule. In *Wiggett v. Fox* ⁽⁴⁾ the facts were very similar to the present, and that case is an authority that the plaintiff and Whittle were the servants of the defendants.

[COCKBURN, C.J.: 'I doubt the correctness of that decision. Baron Channell, in *Abraham v. Reynolds* ⁽⁵⁾, explains the facts in *Wiggett v. Fox* ⁽⁴⁾. If the facts were as the learned Baron says, they may support the decision.]

If the work is not to be considered as being done for the defendants as employers of the whole body of persons engaged in the work, then, secondly, none of the persons engaged were in their employ, and Lawrence, whose negligence caused the injury to the plaintiff, though hired and paid by the defendants, was at the time of the accident the servant of Whittle, being entirely under his control. The act of Lawrence which caused the injury was the negligent carrying out of Whittle's orders. It is said that Whittle *could not dismiss Lawrence; but a servant may be the [208 general servant of one person, and yet may be the servant of another for a particular purpose: *Murray v. Currie* ⁽⁶⁾.

L. Temple, Q.C., in reply.

COCKBURN, C.J.: I am of opinion that the judgment of the Common Pleas Division should be affirmed. My mind has fluctuated during the argument; but I have been led to the opinion I have formed by the answers given to the interrogatories by the managing director of the defendant company. It is quite unnecessary to say whether the case of *Wiggett v. Fox* ⁽⁴⁾, which was relied on for the defendants, was rightly decided. My own view is that it was not; though I might agree with the decision if I could come to the conclusion that the facts were what Baron Channell appears to have thought they were, in the explanation he gives of that case in *Abraham v. Reynolds* ⁽⁵⁾. But I cannot agree that the facts were as the learned Baron states them.

⁽¹⁾ 3 Macq. H. L., 266.

⁽²⁾ E. B. & E., 899; 28 L. J. (Q.B.), 52.

⁽³⁾ 5 B. & S., 570; 33 L. J. (Q.B.), 260.

⁽⁴⁾ 11 Ex., 832; 25 L. J. (Ex.), 188.

⁽⁵⁾ 5 H. & N., 143.

⁽⁶⁾ Law Rep., 6 C. P., 24.

⁽⁷⁾ 5 H. & N., at pp. 149-150.

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It is, however, unnecessary to express any decided opinion on that case, because it does not apply to the present, the facts being different. I regret that our decision must be against the plaintiff, for he has sustained a serious injury owing to the negligence of a man who undoubtedly was at the time of the accident the general servant of the defendants, and who had been placed by them in the position he occupied. But these circumstances afford no ground, in point of law, for visiting the defendants with the result of the man's negligence, if he was not in point of fact their servant at the time, in the sense of being actually employed to do their work. If the agreement had been that, whereas Whittle was to sink the shaft and get away the soil, and do all the necessary work to make a proper shaft, yet that incidentally to this work the defendants had undertaken to do part of it themselves by means of their machinery and servants—so that this part of the work would have been carried on independently of Whittle and not under his control—then the defendants would have been liable. For in that case Lawrence, the engineman, would have continued to be the servant of the company, and would have been working 209] as their *servant at their work. But when we look at the answers to the interrogatories the facts amount to no more nor less than this: Whereas Whittle would have been obliged to hire an engine and engineers in order to carry out the excavation which he had undertaken, the company, having already an engine and attendants on the spot, say to the contractor, "We have got an engine and enginemen ready, and it shall be part of the contract that we will let you have them to do your work and to be under your control, and we will pay you so much the less per yard than we should have done had you been obliged to find the engine and pay the engineer yourself." It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him. Looking at the present case, I think we must arrive at the conclusion that Lawrence was practically in Whittle's service at the time he was guilty of the negligence complained of; and this being so, it follows that Lawrence became the fellow servant of the plaintiff; and it is settled law, which it is now too late to disturb, that a servant cannot recover damages

from his employer for any injury he may have sustained through the negligence of a fellow servant. Therefore, Lawrence and the plaintiff, being fellow servants in the employ of Whittle, it follows that the plaintiff cannot maintain an action against the defendants. The judgment must, therefore, be affirmed.

MELLISH, L.J.: I am of the same opinion. There are two questions: First, whether Lawrence, in doing the act complained of, was acting as the servant of the defendants, or of Whittle. If he was not acting as the defendants' servant, they would not be liable; but if he was acting as the servant of the defendants they might be liable. But then the second question would arise whether or not the plaintiff was his fellow servant. In the result at which I have arrived it becomes unnecessary to answer the second question, because I think that the effect of the *evidence is that [210 Lawrence was not acting as the servant of the defendants at the time the injury occurred to the plaintiff.

The question of law applicable to this case was much considered in this court in the case of *Purnell v. Great Western Ry. Co. and Harris* (¹), in which case the Master of the Rolls very clearly pointed out that A.'s servant might, for a particular purpose or on a particular occasion, be the servant of B., though he continued the servant of A. and was paid by him. In that case we had to consider whether, on the peculiar facts, the persons who had been guilty of negligence were at the time acting as the servants of the company, or of Harris, in whose service they undoubtedly were. And though the particular work they were doing was for the benefit of the company, as it was part of the work which the company had undertaken to do, namely, bringing and unloading the timber for the work, yet as it appeared that they were acting under the immediate orders of their master, we thought, on that ground, that they still remained the servants of their own master, Harris. But we all thought that, if they had been acting under the orders of the Great Western Company's superintendent, they would have become the servants of the company, notwithstanding they remained the general servants of Harris and were paid by him.

In this case it is not disputed that Lawrence was the general servant of the defendants, being hired and paid by them; but the question is, whether he was not lent, so to speak, to Whittle, so as to become his servant for this particular work. It appears from the evidence, and more particularly

(¹) Reported, on a point of practice, 1 Q. B. D., 636.

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from the answers to the interrogatories, that Whittle undertook, as one general contract, the work of continuing the making the shaft which the defendants had begun, including the bringing up of the soil excavated and the letting down and bringing up the workmen, which involved the use of a steam engine and the necessary gear. It naturally happened that the defendants had an engine on the spot and engineers already engaged, so that it was for the mutual benefit of both parties that the company's engine and men should do the work, and it was accordingly agreed that the company should place at the disposal of Whittle the necessary engine power, *ropes, and hoppets, with two engineers, one to work the engine by day and the other by night, such engineers being under the control of the contractor. The effect of this agreement was that the whole job was let out to Whittle, but the engine was to assist him in doing the work, and the engineer, though remaining the general servant of the defendants and paid by them, was, while working at this shaft, to act under the control and orders of Whittle. That, in my opinion, makes the acts of Lawrence, while working the engine, the acts of Whittle and not of the defendants. Lawrence's duty, according to the orders of Whittle, was to have stopped his engine at the proper time, and not doing this, he was negligent in not obeying the orders of Whittle, and this in law amounted to the negligent act of Whittle. It follows that the defendants are not liable; and it is unnecessary to consider whether the plaintiff was the fellow servant of Lawrence in Whittle's employ.

BAGGALLAY, J.A.: It is immaterial to consider whether Lawrence was the servant of Whittle for all purposes; it is sufficient if he became servant of the contractor for the purposes of the work in which he was engaged at the time of his negligence. The contract of Whittle was to make the shaft or pit, not merely to sink a shaft; and it was as much part of the work to bring up the excavated material as to sink. But the company were to put at his disposal the engine and engineman in order to enable him to raise and dispose of the excavated soil. It was urged that it was the duty of the defendants to supply the engine and pay the engineman; and no doubt it was so, but the terms were that the engineman was to be under the orders and control of the contractor himself. It was necessary for the due carrying on of the works that the man regulating the sinking and excavating should also regulate the bringing up of the stuff excavated. Therefore, as far as regards this particular

work, Lawrence was acting as servant of the contractor. This, as I have said, renders it unnecessary to consider whether the plaintiff and Lawrence were in one common employment.

BRAMWELL, J.A.: I think this is the case of common employment; and I think it most undesirable that where two men are in *the same service the master should [212 be liable to the one for damage caused by the negligence of the other. I can see no reason for it, except that it may be convenient that there should be a defendant who can answer in damages. It seems to me to be a sufficient protection to the servant that the master is under the obligation to provide servants competent for the work in which they are to be employed. If the plaintiff and Lawrence had been in the defendants' service and Lawrence had been proved to be unskilful, and the accident had happened through his unskilfulness, the plaintiff would have had a right of action against the defendants; so if the engine had been ill-constructed.

I agree that the judgment must be affirmed, on the ground that Lawrence was not the defendants' servant at the time.

Judgment affirmed.

Solicitors for plaintiff: *Torr, Janeway, Taggart & Co.*, for Edwin Hughes, Liverpool.

Solicitors for defendants: *Gregory & Co.*, for H. S. Malton, Liverpool.

See 17 Eng. Rep., 300 note; 19 Eng. Rep., 343, and to Venables v. Rep., 275 note; note to Whiteley v. Smith, ante, p. 349.

[2 Common Pleas Division, 212.]

Feb. 2, 1877.

[IN THE COURT OF APPEAL.]

BRANTOM V. GRIFFITS and Others (').

Bill of Sale—Bills of Sale Act (17 & 18 Vict. c. 36), s. 1, 7—Growing Crops not "Goods or other Articles capable of complete Transfer by Delivery."

A document,—by which A. agrees to sell to B. "five acres of wheat now standing in, &c., at £6 per acre, B. to cut and carry the corn any time he may require; and B. agrees to purchase the said five acres upon the above conditions,"—is a bill of sale within the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1, as the intention is apparent to pass the immediate property.

Growing crops are not "personal chattels" within s. 1, which is defined by s. 7 to "mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery."

(') Affirming 17 Eng R., 301.

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Brantom v. Griffiths.

APPEAL from the decision of the Common Pleas Division making absolute an order to enter judgment for the plaintiff⁽¹⁾.

This was an interpleader issue, in which the defendants were the execution creditors of the Misses Miles, and had seized in July, 1875, *inter alia*, growing crops on the farm occupied by them, *and the plaintiff claimed the crops under several documents which had been executed by Miss A. Miles (acting for herself and sisters) early in the year, in the following form:—

“Miss A. Miles hereby agrees to sell to W. Brantom five acres of wheat, now standing on the Beeches, at the sum of £6 per acre; W. B. to cut and carry the corn any time he may require; and W. B. doth hereby agree to purchase the said five acres of corn as mentioned above on the above conditions.

A. Miles,
“W. Brantom.”

The documents had not been registered as bills of sale.

Two points were raised: first, whether the documents were bills of sale; secondly, whether growing crops were within Bills of Sale Act (17 & 18 Vict. c. 36), ss. 1, 7.

The Common Pleas Division decided that the documents were bills of sale; but that growing crops were not within the act; and that the plaintiff's title was therefore good against the defendants⁽²⁾.

The defendants appealed.

1876. Nov. 30. *Metcalfe*, Q.C., and *Graham*, for the defendants.

1877. February 6. *Merewether* and *Clare*, for the plaintiff: The arguments were the same as in the court below; in addition to the cases there cited, the following authorities were referred to for the plaintiff: *Washbourn v. Burrows*⁽³⁾; *Ex parte Reynal*⁽⁴⁾; *Boydell v. M'Michael*⁽⁵⁾; *Peacock v. Purvis*⁽⁶⁾; *Meux v. Jacobs*⁽⁷⁾; *Hodgson v. Gascoigne*⁽⁸⁾.

Graham, in reply, referred to *Jones v. Flint*⁽⁹⁾; *Crosby v. Wadsworth*⁽¹⁰⁾; Godolphin's Orph. Leg., part iii, ch. 21, § 13, p. 418.

COCKBURN, C.J.: I am of opinion that the appeal should be dismissed. The sale in question is a sale of growing crops; and two questions are presented: first, whether the

⁽¹⁾ 1 C. P. D., 349; 17 Eng R., 301.

⁽²⁾ 1 C. P. D., 349.

⁽³⁾ 1 Ex., 107; 16 L. J. (Ex.), 266.

⁽⁴⁾ 2 M. D. & De G., 443.

⁽⁵⁾ 1 C. M. & R., 177.

⁽⁶⁾ 2 B. & B., 362.

⁽⁷⁾ Law Rep., 7 H. L., 481.

⁽⁸⁾ 5 B. & Ald., 88.

⁽⁹⁾ 10 Ad. & E., 753.

⁽¹⁰⁾ 6 East, 602.

document by which the sale was effected is a bill of sale; secondly, whether standing *crops, which were the [214 subject-matter of this sale, are within the statute, so as to make it necessary to the validity of the bill of sale that it should have been registered. On the first question I am of opinion that this was a bill of sale. It is true that, in terms, it purports to be only an agreement to sell, but the obvious meaning of the parties is that the one actually sells and the other buys. If they had agreed to execute some other instrument afterwards, by which the property should be transferred, then the first document would not have been a bill of sale. But here there is an agreement to sell and purchase, amounting to a transfer in *præsenti*, which is a bill of sale.

Secondly, on the question whether growing crops are within the statute, I think they are not. The Bills of Sale Act, s. 1, relates to personal chattels; but, by the interpretation clause, s. 7, the expression "personal chattels" means "goods, furniture, fixtures, and other articles capable of complete transfer by delivery." I agree that that clause is susceptible of two readings, and it is possible that "capable of complete transfer by delivery" should be read with the words "other articles" only; but even assuming this to be so, the expression still shows what the intention of the statute was, and leads to the inference that it was intended that only such goods as are capable of present delivery should be included in the term "personal chattels." Such a construction would clearly meet the mischief intended to be remedied by the statute; it having been notoriously the habit of persons to obtain fictitious credit, which their real circumstances did not warrant, by retaining apparent possession of goods, the ownership of which they had parted with to others, but which appeared to be really their own by remaining in their possession,—a course of proceeding calculated to prejudice the honest creditor. "Personal chattels" is confined therefore, in my opinion, to goods capable of present delivery and removal. Now it is impossible that there can be present delivery of growing crops. A growing crop is valueless, except so far as by its continuing growth it may hereafter benefit the purchaser, and it is only when it reaches maturity that it can be removed; nor is it intended that it shall be removed till it is ripe. It is not like the case in which there is a secret transfer of movable property which can be at once removed, and *the ap- [215 parent possession of which is suffered to remain in a person who has parted with the ownership. In a popular and

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practical sense, growing crops are no more capable of removal than the land itself.

MELLISH, L.J., and BRAMWELL, J.A., concurred.

Judgment affirmed.

Solicitor for plaintiff: *Mote*.

Solicitor for defendants: *Selby*.

See 17 Eng. Rep., 308 note.

A debtor cannot, by a fraudulent sale of the land, deprive a creditor of the right to levy upon the crops planted or sowed by the debtor and growing at the time of the conveyance: *Pierce v. Hill*, 35 Mich., 194.

Otherwise of crops planted or sowed by the grantee after such a conveyance: *Garbutt v. Smith*, 40 Barb., 22; *Jones v. Bryant*, 13 N. H., 53.

Where a tenant, at a time when no rent was due from him, and there had been no breach or forfeiture of his lease, has sold to a third person a growing crop of wheat, the fact that, afterwards, upon the rent becoming due, the tenant failed to pay, abandoned the premises and surrendered possession thereof, by agreement, to his landlord, cannot impair the title of such purchaser in the crop: *Nye v. Patterson*, 35 Mich., 418.

See *post*, note to *In re Eslick*, p. 728.

The purchaser at a foreclosure sale in Chancery becomes the owner of the crops then growing upon the premises, even though he hold the legal title as

security for advances to be made, provided he had not agreed to pay or discharge the mortgage under which the foreclosure was made: *Scriven v. Moote*, 36 Mich., 64, 33 Mich., 500.

Where, upon his leasehold, a tenant is raising a crop, of which, by the terms of the tenancy, his landlord is to receive as rent a certain portion, yet to be designated, as it stands unharvested in the field, the right of possession of the whole, as between the landlord and tenant, is in the latter.

Where, prior to a division of such crop, in accordance with the terms of such tenancy, the landlord unlawfully and negligently suffers breachy animals, belonging to himself, to break through the inclosure surrounding such crop and injure the same, he is liable to the tenant for damages, in an action therefor.

On the trial of such action, evidence that the tenant, in dividing the residue of such crop, had retained a part of the portion to which the landlord was entitled, is inadmissible in mitigation of damages: *Froot v. Hardin*, 56 Ind., 165.

[2 Common Pleas Division, 215.]

Feb. 3, 1877.

[IN THE COURT OF APPEAL.]

PURCELL V. SOWLER and Others⁽¹⁾.

Libel—Privilege by Reason of the Occasion—Publication of Matters of Public Interest—Meetings of Poor-laws Guardians—Ex parte Charges.

The administration of the poor-laws, both by the government department and by the local authorities, including the conduct of the medical officers, is matter of public interest; but the publication of a report of proceedings at a meeting of poor-law guardians, at which *ex parte* charges of misconduct against the medical officer of the union were made, is not privileged by the occasion.

ACTION for libel. The libel was contained in a report, published in a Manchester newspaper, by the defendants, the

⁽¹⁾ Affirming 18 Eng. Rep., 332.

proprietors, of the proceedings at a meeting of the board of guardians for the Altrincham poor-law union, at which *ex parte* charges were made against the plaintiff, the medical officer of the union workhouse at Knutsford, of neglect in not attending the pauper patients when sent for.

At the trial it appeared that the charges were unfounded in fact, but it was admitted that the report was accurate and *bona fide*. A verdict was taken by consent for the plaintiff, with nominal damages and costs, judgment to be entered accordingly, with leave to move to enter judgment for the defendants, if the court should be of opinion that the publication was privileged.

The Common Pleas Division refused the motion, ordering judgment to stand for the plaintiff⁽¹⁾.

*The libel, &c., are set out at length in the report [216 in the court below.

The defendants appealed.

J. Edwards, Q.C., for the defendants: The ground on which the judgment of the Common Pleas Division is based was that the conduct of a medical officer of a provincial poor-law union was not matter of general public interest. But surely the administration of the poor-laws, including medical relief to the paupers, and the conduct of the medical officer, is of public interest, however small or obscure the union may be. If the ground taken by the court below were tenable, it would go to overrule all such cases as *Kelly v. Tinling*⁽²⁾, *Davis v. Duncan*⁽³⁾ and *Henwood v. Harrison*⁽⁴⁾. *Davison v. Duncan*⁽⁵⁾ is to the contrary; but the principle of *Wason v. Walter*⁽⁶⁾ has very much extended the doctrine of privilege in favor of publicity, on account of the public advantage derived from fair reports of all matters of general interest; and *Davison v. Duncan*⁽⁵⁾ is inconsistent with the later cases already cited.

[COCKBURN, C.J.: It is for the public advantage that all matters which may be openly discussed should be fairly communicated to all the public, as well as to those who happen to be present; but here an *ex parte* charge against a public officer in his absence, although of public interest, ought to be discussed in *camera* in the first instance.

MELLISH, L.J.: Concede that what was said at the meeting was privileged, does that privilege extend beyond the room, or to communicating it to any one except those whose duty it was to investigate the charge?]

⁽¹⁾ 1 C. P. D., 781; 18 Eng. R., 332.

⁽²⁾ Law Rep., 1 Q. B., 699.

⁽³⁾ Law Rep., 9 C. P., 396.

⁽⁴⁾ Law Rep., 7 C. P., 606.

⁽⁵⁾ 7 E. & B., 229; 26 L. J. (Q.B.), 104.

⁽⁶⁾ Law Rep., 4 Q. B., 73.

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C. Russell, Q.C., and *Bigham*, for the plaintiff: The argument attributed by the judgment of the Common Pleas Division to the counsel for the plaintiff is not the ground that was really submitted to the court. It may be admitted that the plaintiff's position was such as to make it one of public interest, so that his conduct might be made the subject of comment on a proper occasion. But *this was a preliminary discussion, no facts proved, but only an *ex parte* statement, and was a matter for further inquiry. Such an occasion, except perhaps it were in a court of law, is not privileged; or if it took place in Parliament, according to the more recent decision in *Wason v. Walter* ⁽¹⁾. But there is no analogy between the proceedings at a meeting of a board of guardians and judicial proceedings in a court of law or parliamentary proceedings. The meeting is not public; the public are generally admitted perhaps, but there is nothing in the statutes requiring that the public should be admitted. Lastly, this is not a case of comment, but a statement of facts, of charges of misconduct, which were not true.

[BRAMWELL, J.A.: In *Popham v. Pickburn* ⁽²⁾ that distinction was taken and acted upon by the court.]

Davison v. Duncan ⁽³⁾ is directly in point. Soon after that decision Lord Campbell, in 1858, brought in a bill to make the reports of the proceedings at certain public meetings privileged, but the House of Lords threw it out; and the debates show that all the Law Lords thought that, without the protection of an act of Parliament, the reports of such meetings would not be privileged: See Hansard's Debates, 3d series, vol. cxlix, pp. 947-82. A passage from the judgment of Willes, J., in *Henwood v. Harrison* ⁽⁴⁾ was relied on for the defendants, where he says: "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals." But that principle has no application to such a case as the present; it might be very different had the charges been established against the plaintiff, and the defendants had then published the statement without any comment, or with fair comments.

J. Edwards, Q.C., in reply.

⁽¹⁾ Law Rep., 4 Q. B., 73.

⁽²⁾ 7 H. & N., 891; 31 L. J. (Ex.), 133.

⁽³⁾ 7 E. & B., 229; 26 L. J. (Q.B.), 104.

⁽⁴⁾ Law Rep., 7 C. P., 606, 622.

COCKBURN, C.J.: I am of opinion that the judgment must be affirmed. But I am very anxious that it should be understood that *my opinion is not based on the grounds on [218 which the judgment of the Common Pleas Division appears to have been founded. As I understand it, that judgment proceeded on the ground that the subject-matter of the present action, which is an action of libel for a report in the defendants' newspaper of the proceedings of a board of guardians relating to the conduct of a medical officer of the poor-law union, was not a matter of public interest. In that view I am unable to concur. My reasons are very simple: It is impossible to doubt that the administration of the poor-law is a matter of national concern. The court below seems to have distinguished between the general and the local administration of the poor-law, holding that the general administration was a matter of national concern, while the administration in a particular district was not. But it seems to me that whatever is matter of public concern when administered in one of the government departments, is matter of public concern when administered by the subordinate authorities of a particular district. It is one of the characteristic features of the government of this country that, instead of being centralized, many important branches of it are committed to the conduct of local authorities. Thus the business of counties, and that of cities and boroughs, is, to a great extent, conducted by local and municipal government. It is not, therefore, because the matter under consideration is one which in its immediate consequences affects only a particular neighborhood that it is not a matter of public concern. The management of the poor and the administration of the poor-law in each local district are matters of public interest. In this management the medical attendance on the poor is matter of infinite moment, and consequently the conduct of a medical officer of the district may be of the greatest importance in that particular district, and so may concern the public in general. I therefore cannot concur with the Common Pleas Division in thinking that the matter to which the present libel relates was not a matter of public interest within the rule as to privileged publications.

The true question in the present case is whether, though the subject-matter was of general interest, the occasion on which the words were uttered was privileged, so as to protect the *bona fide* publication of the report. There is no doubt that the report of *proceedings in a court of [219 justice, the administration of the law being of public interest

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and concern, if the report is fairly made, is privileged. Again, since *Wason v. Waller* (¹), there can be no question that the proceedings of Parliament may be published, although statements may have been made in the course of a debate prejudicially affecting the character of private individuals. But those cases form no precedent for the present. Many intermediate cases may be put. Take the meetings of the corporation of the city of London—the discussion at such meetings might involve strong observations on the conduct of particular individuals: so also as to the municipal councils of other cities and boroughs: so again as to the meetings of magistrates in quarter sessions, not as courts of justice, but for transacting the business of their county. In all these cases I should be sorry to lay down as law that the proceedings of such meetings may not be fully reported, although the character of private individuals may be incidentally attacked. But it is unnecessary, for the decision of the present case, to lay down any such rule; and I wish to be understood as by no means saying that the proceedings of different bodies to whom part of the administration of the public business of the country is committed would not be matter of general discussion and publication. In these instances publicity may be essential to good administration. But here we have to deal with the case of a body of very limited jurisdiction, and as to which it cannot be asserted that publicity is essentially necessary or usual. It is quite clear that the meetings of poor-law guardians are not necessarily public: they have full right to close their doors, and although the public are generally admitted, yet, when charges are to be made affecting private character, the more proper course would be to close the doors and hold the discussion in *camera*. In the present case that course unfortunately was not adopted; the reporter of a newspaper was admitted, and he communicated what had been said to the newspaper, and so the libel was published. Was the occasion privileged? There is no authority for holding it to be so, and I think it was not. Suppose a meeting of the poor-law board in London (which sits with closed doors) for the discussion of matter of a similar nature to the present, and 220] some one thought proper to send a report of it *to a newspaper, it is quite clear that an action would lie at the suit of the person whose character was so assailed by the publication of the proceedings. The same may be said of an inquiry at the Horse Guards or Admiralty. A prelim-

(¹) Law Rep., 4 Q. B., 73.

inary inquiry, which might be and ought to be carried on with closed doors, is not the proper subject of a public report. This is one of the cases in which the board of guardians are not called upon to make their proceedings public. They were clearly not bound to do so, and they ought to exercise proper discretion as to closing their doors. It may be said that although a board of guardians have a discretion to close their doors, if they choose to admit the public, what passes should be open to publication. But there is no authority for this position; and the effect of it would be that an unwise exercise of the discretion might expose a man to a publication otherwise libellous. If the guardians choose to open their doors when they ought to close them, and a reporter is admitted, the editor or proprietor of the newspaper ought to exercise his discretion, and not publish libellous matter, which may be justified by the occasion so far as the speaker is concerned, but not so far as affects publication. Therefore, without encroaching on the general principle which is now established as applicable to other public bodies, I do not think that principle applicable to the present case. The judgment for the plaintiff must therefore be affirmed.

MELLISH, L.J.: I am of the same opinion. We are asked to extend the law of privilege as to the report of proceedings of a public body to an extent beyond what it has as yet been carried. In Lord Campbell's time it was supposed that the privilege only extended to the proceedings in a court of law. A report of such proceedings has always been held privileged, because all Her Majesty's subjects have a right to be present, and there would, therefore, be nothing wrong in putting the rest of the public in the position of those who were actually present. The privilege has been extended to the publication of debates in Parliament, and properly extended, as they stand on the same principle as the proceedings in courts of law. There is no doubt this distinction: that as to courts of law the public have a right to be present, but they are only admitted to the debates in either House of Parliament *when the House [221 chooses to permit them to be present. The House has a discretion, but when the debates are held in public, it is clear that a newspaper ought not to be held to commit an offence by putting those who were not present in the same position as those who were. It is argued that this privilege ought to be extended as to a variety of other public bodies. I express no decided opinion, and I desire, with the Lord

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Chief Justice, to be understood as expressing no opinion; but at the same time I am clearly of opinion that the privilege ought not to be extended to such a case as the present. A board of guardians have a discretion whether or not they will admit the public to their meetings; and whether they choose to exclude or choose to admit, the public have no right to complain. But I cannot think that the courts of law are to be bound by the mode in which the guardians exercise their discretion in admitting or excluding strangers. Although they admit the public on an occasion when *ex parte* charges are made against a public officer, which may affect his character and injure his private rights, it is most material that there should be no further publication; there is no reason why the charges should be made public before the person charged has been told of the charges, and has had an opportunity of meeting them; and I cannot see any inconvenience in holding that the publication is not privileged; in holding otherwise we should be depriving the individual of his rights without any commensurate advantage. The law on the subject of privilege is clearly defined by the authorities. Such a communication as the present ought to be confined in the first instance to those whose duty it is to investigate the charges. If one of the guardians had met a person not a rate-payer or parishioner, and had told him the charge against the plaintiff, surely he would have been liable to an action of slander. I do not mean to say that the matter was not of such public interest as that comments would not be privileged if the facts had been ascertained. If the neglect charged against the plaintiff had been proved, then fair comments on his conduct might have been justified. But that is a very different thing from publishing *ex parte* statements, which not only are not proved but turn out to be unfounded in fact. I am, therefore, clearly of opinion 222] that the occasion *of the publication was not privileged, and that the judgment for the plaintiff ought to be affirmed.

BAGGALLAY, J.A.: I am of the same opinion, and will add only a few words. I cannot draw any distinction between the present case and some of those cited for the plaintiff. For instance, the facts of *Popham v. Pickburn* ⁽¹⁾ are very similar to the present. Here statements are made to a meeting of the guardians by the master of the workhouse, charging the plaintiff, the medical officer, with misconduct; in *Popham v. Pickburn* ⁽¹⁾ there was a report to

⁽¹⁾ 7 H. & N., 891; 31 L. J. (Ex.), 133.

the vestry board by their medical officers that a medical man had given false certificates, it was held that the publication was not privileged. The same principle must apply in the present case. Nor does it appear to me that the decision in *Wason v. Walter* (') in any way conflicts with the previous decisions. The reports of debates in Parliament were held privileged on the same principle as reports of the proceedings in courts of law; viz., the advantage of general publicity. It is not material to consider whether the privilege ought to be extended; I am satisfied that it ought not to be extended to such a case as the present, and that there is nothing in *Wason v. Walter* (') inconsistent with our decision of the present case.

BRAMWELL, J.A.: I am of the same opinion, and I desire to say why. It is not because I am insensible to the advantage of giving full effect to the privileges of the public press. The world is governed by public opinion; and public opinion is formed chiefly by means of the public press, and of the periodical public press especially. But I think law and reason and good sense are against the privilege extending to the present case. I cannot, as the Lord Chief Justice has said, agree with the reasons given by the Common Pleas Division. If this had been a discussion on the plaintiff's conduct, the facts not being in controversy, the matter was a subject of such general public interest as would have given a right to comment upon it; and fair and *bona fide* comments would have been justified. But that is not this case. This is a case in which the defendants have pub- [223
lished a true and *bona fide* report of a statement of facts charged against the plaintiff, but a statement which shows that the person making it was making it in the absence of the plaintiff and without any knowledge on the part of the person making it. There was no duty to report such *ex parte* proceedings; if the guardians did not exclude strangers, as they might well have done, the reporter ought to have taken care what he was about, and not to have reported libellous matter; and the defendants, having published it, must take the consequences. Serious and grievous harm has resulted to the plaintiff, whose character has been assailed, and for no public good. What is the law? Surely that such a publication is not privileged. Mr. Edwards, indeed, admitted that the cases were against him; but he said the law had been modified since, and he relied on *Wason v. Walter* ('), but that case is clearly distinguishable

(') Law Rep., 4 Q. B., 78.

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from the present, for the reasons already given. The judgment must be affirmed.

Judgment affirmed.

Solicitor for plaintiff: *C. W. Dommett*, for J. R. Barling, Manchester.

Solicitors for defendants: *Johnson & Weatheralls*, for Stevenson, Lycett & Co., Manchester.

[2 Common Pleas Division, 224.]

Feb. 13, 1877.

224] *JOHNSON V. THE CRÉDIT LYONNAIS.

Agent or Factor intrusted otherwise than for Sale or Dealing—Factors Acts, 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39.

The plaintiff, a tobacco manufacturer at Bolton, bought of H., a commission merchant and agent, and also a dealer in tobacco, 50 hhds. of tobacco then lying in bond in the name of H. in the L. Dock. The price was paid, but the tobacco was to remain in the dock, to be forwarded to the plaintiff as he might want it for the purpose of his business, with an understanding that the tobacco was to be cleared by H. and dispatched to Bolton free of any charge for commission, or, should the plaintiff sell any portion of it, to be delivered to his vendees; the plaintiff remitting to H. the amount of duty and dock charges. This arrangement was one so usual in the tobacco trade that any other arrangement was exceptional. For this purpose the tobacco was allowed to remain in the name of H. in the dock books, and he retained the dock-warrants. In his own books, however, the transaction was entered as a sale to the plaintiff.

H., representing the tobacco to be his own property, pledged it with the defendants as security for a loan, handing them the dock-warrants; and he caused the tobacco to be transferred into their names in the dock books, the defendants having no knowledge that the plaintiff was interested in it. H. shortly afterwards absconded, and was adjudicated bankrupt. The plaintiff demanded the tobacco of the defendants, but they claimed to retain it, either on the ground that the plaintiff had armed H. with an ostensible authority to deal with the goods as his own, or that he was intrusted with the tobacco or the documents of title with authority to pledge or sell, within the Factors Acts:

Held, by Denman, J., on motion for judgment, the judge having power to draw inferences of fact, that H. was not intrusted with the tobacco as factor or agent for sale, but only to clear and forward it to the plaintiff or to his vendees as and when required, and consequently that he had no authority to sell or to pledge it.

Held, also, that, looking at the usage of the trade, the plaintiff had not given any ostensible authority to H. to pledge the tobacco.

CLAIM. 1. On or about the 3d of December, 1875, the plaintiff, who is a tobacco manufacturer, bought of one J. A. Hofmann and became the absolute owner and entitled to the possession of D G, 50 hhds. of tobacco then lying in bond at the London and St. Katharine's Dock.

2. Afterwards Hofmann, without any authority from and in fraud of the plaintiff, affected to transfer the tobacco to the order of the defendants, and delivered to the defendants

the dock-warrant or other receipt issued by the dock company in respect of the goods, or the defendants otherwise became possessed of the *dock-warrant and tobacco [225 in wrong of the plaintiff. Hofmann afterwards absconded.

3. The plaintiff applied to the dock company for delivery of his tobacco; but they, following the ordinary course of business, refused to comply with his request until the dock-warrant should be produced to them duly signed or indorsed in his, the plaintiff's, favor.

4. Thereupon the plaintiff applied to the defendants for the dock-warrant and for delivery of his tobacco, but they refused to part with or deliver the same to him, and claimed and still claim to retain the same as security for advances alleged to have been made by them to Hofmann at the time of the delivery to them of the dock-warrant, as in the second paragraph mentioned.

DEFENCE. 1. The defendants do not admit that on or about the 3d of December, 1875, or at any other time, the plaintiff bought of Hofmann or became the absolute owner and entitled to the possession of the tobacco.

2. The defendants do not admit that the transfer of the tobacco and delivery of the said dock-warrant or dock-warrants by Hofmann to them was without any authority from or in fraud or wrong of the plaintiff.

3. The defendants claim to be entitled to retain the tobacco and the proceeds thereof in satisfaction or part satisfaction of moneys advanced by them, and they say that the tobacco was transferred and delivered to them under the following circumstances:

4. On the 24th of January, 1876, Hofmann, who was then a commission merchant and factor carrying on business in London under the name of J. A. Hofmann & Co., and who was also a large dealer in tobacco, applied to the defendants for an advance of £3,500 on the security of a pledge of tobacco stated by him to be his property, and lying at the London and St. Katharine's Dock, and for which he held dock-warrants in his own name. He produced a list and valuation of the tobacco, being the memorandum of the 24th of January, 1876, hereinafter set forth, and in that list were included the 50 hhds. of tobacco, erroneously described in the statement of claim as marked D G, but really marked D Q. The whole of the tobacco in that list was valued at £4,200, but *the valuation of the 50 hhds. was only [226 £1,250 or thereabouts. Hofmann then handed the defendants the list and valuation, of which the following is a copy:

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MEMORANDUM.

From J. A. Hofmann & Co., 15 Gresham Street, London, to Crédit Lyonnais, 29 Lombard Street. 24th January, 1876.

				Cwts. qrs. lbs.						
D Q	1441/50	.. 10	hhds.	}	..	..	..	63	0	22
	1451/60	.. 10	"		..	..	..	72	1	21
	1461/70	.. 10	"		ex Denmark	@	66	2	8	
	1471/80	.. 10	"		New York	..	69	2	12	
	1481/90	.. 10	"		..	..	..	71	8	4
								@ 8d. £1272 11 0		

[Then followed an enumeration of the tobaccos, the value of the whole being stated at £4,200.]

5. The defendants consented to make the advance, the terms of which were expressed in the following letter from them to Hofmann :

29 Mincing Lane, 24 January, 1876.

Messrs. J. A. Hofmann & Co.

Gentlemen,—By this we beg to acknowledge receipt of the following warrants for tobacco :

5 warrants, 50 hhds. ex Denmark.

[Here followed an enumeration of other 22 warrants.]

27 warrants valued as per your statement at £4,200, against which we handed you our check £3,000, being part of £3,500 that we have agreed to lend you for two months on deposit of warrants for tobacco of a sufficient value. Interest to be charged at 5 per cent. per annum, plus a commission of $\frac{1}{2}$ per cent. It is understood that the warrants will be at your disposal for the purpose of exchanging them for others, and that all valuations will be subject to our approval.

(Signed) A. Bidелеux.

P.S. In regard to the insurance, please hand us the policies at your convenience to-morrow.

The 50 hhds. ex Denmark mentioned in the foregoing letter are the 50 hhds. marked D Q.

6. The defendants accordingly advanced to Hofmann £3,000 on the 24th of January, 1876; and on the 9th of February, 1876, they advanced to Hofmann on the same terms and under the same circumstances as in the advance of £3,000, the further sum of £900 on the security of the tobacco already pledged and of 50 other hhds. of tobacco then pledged with the defendants by Hofmann, and valued at £1,280; and on the 19th of February, 1876, they advanced 227] *to Hofmann on the same terms and under the same circumstances the further sum of £800 on the security of the previous pledges and of certain other tobacco then pledged with the defendants by Hofmann, and valued at £1,680.

Hofmann paid to the defendants on account of the said pledges sums of money amounting to £700, and received back from the defendants tobacco of greater value than the amount so paid by him; and at the time when Hofmann absconded, as mentioned in the statement of claim, he was indebted and still is indebted to the defendants in respect of the advances made on the security of the said pledges in the sum of £4,000, exclusive of interest, commission, and insurance.

7. Hofmann on the 24th of January, 1876, transferred and delivered to the defendants five dock-warrants for the 50 hhds. of tobacco, each warrant being for 10 hhds., in the name of Hofmann. At the time when the advances were made on the security of the pledge, the defendants believed the representation made to them by Hofmann that the 50 hhds. D Q were his property, and had no knowledge or means of knowledge of the plaintiff's alleged claim to them.

8. The defendants delivered up to the dock company the five warrants for the 50 hhds. D Q to be cancelled, and took instead thereof fresh warrants in their own names. The five warrants in the name of Hofmann were so delivered up and cancelled before any notice to the defendants and before any knowledge by the defendants that the 50 hhds. D Q were claimed by the plaintiff.

9. If the plaintiff was, as alleged by him, the true owner of the 50 hhds. of tobacco at the time when the pledge thereof was made to the defendants, Hofmann was the plaintiff's factor or agent intrusted with the possession of the goods and of the documents of title thereto.

10. The plaintiff at the date of the pledge to the defendants by Hofmann had given him actual or ostensible authority to deal with the goods as owner thereof or as an agent entitled to sell or pledge the same.

11. Under the circumstances before mentioned, the defendants admit that the plaintiff has applied to the dock company and to the defendants for the delivery to the plaintiff of the dock-warrants and tobacco, and that such delivery has been refused.

*REPLY. 1. The plaintiff joins issue on the defendant's statement of defence. [228

2. The plaintiff will in case of need rely upon a custom in the tobacco trade whereby manufacturers who purchase tobacco in bond leave the goods in the possession of the selling brokers or vendors until such time as the goods are actually required for manufacturing purposes.

The case was argued, on motion for judgment, before

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Denman, J., on the 31st of January, 1877. The facts and arguments are fully stated in the judgment.

Thesiger, Q.C. (*Bigham* with him), for the plaintiff, referred to *M'Combie v. Davies* (¹), *Pickering v. Busk* (²), *Fuentes v. Montes* (³), and *Cole v. North Western Bank* (⁴).

Benjamin, Q.C. (*Watkin Williams*, Q.C., and *Woolf*, with him), commented on the Factors Acts, 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39, and upon the cases cited for the plaintiff, and referred to *Boyson v. Coles* (⁵), *Monk v. Wittenbury* (⁶), *Dyer v. Pearson* (⁷), *Vickers v. Hertz* (⁸), and *Goodwin v. Roberts* (⁹).

Cur. adv. vult.

Feb. 13. DENMAN, J.: This was an action tried before me at Westminster on the 25th of January last. The facts were taken entirely by admission, and I heard the arguments on the motion for judgment on the 31st of January. The action was for £1,256 18s. 8d., the value of 50 hhds. of tobacco belonging to the plaintiff, and pledged with the defendants by one Hofmann on the 24th of January, 1876, under the circumstances stated by admission at the trial. The plaintiffs also contended that, if not entitled to the whole value, they might be entitled to an account: but no question now arises on this head, as it was agreed that any such questions should stand over to be decided, if necessary, hereafter. The admissions made at the trial were so ably and briefly [229] stated by *counsel on both sides as to make it superfluous to do more than to read in most cases the very words of the admissions as they appear upon my notes (in some cases, however, omitting some unnecessary details), and after stating what conclusions of fact I draw under the power given by agreement at the trial, to explain the grounds of the judgment I have arrived at.

It appears that for some years down to March, 1876, one Hofmann (whose acts were relied upon under the circumstances by the defendants as giving them a title to the goods) carried on business in London, selling goods of various descriptions,—silks, velvets, and ribbons, as well as tobaccos,—under the style of J. A. Hofmann & Co. The tobacco business was of two kinds, partly receiving consignments from foreign houses on the continent, who drew on J. A.

(¹) 6 East, 538.

(²) 15 East, 38.

(³) Law Rep., 3 C. P., 268; in error, Law Rep., 4 C. P., 93.

(⁴) Law Rep., 9 C. P., 470; in error Law Rep., 10 C. P., 354.

(⁵) 6 M. & S., 14.

(⁶) 2 B. & Ad., 484.

(⁷) 3 B. & C., 38.

(⁸) Law Rep., 2 H. L. Sc., 113.

(⁹) 1 App. Cas., 476.

Hofmann & Co. for the value of goods less commission del credere and agency, partly receiving tobacco owned by Hofmann himself and his brother from America. The brother was not a partner in J. A. Hofmann & Co. The following was the course of business as regards purchases of tobacco: The tobacco on arrival being consigned to Hofmann & Co. would be placed in bond in the warehouses at the docks, standing in the name of J. A. Hofmann & Co. Their agent, Kuschke, would then take samples to the large manufacturing houses, who would make purchases from time to time in quantities beyond their immediate requirements. Kuschke would then agree with the purchasers *to clear the goods when required*, generally charging 1s. per bale for his services. In the case of the plaintiff no commission was charged, in consideration of the distance at which he lived (viz. at Bolton) and the expense of carriage. Owing to the large proportion which the duty bears to the value of tobacco, a practice has arisen of leaving the goods in the warehouse *in the name of the seller*, which is not invariable, but the contrary is the exception. The plaintiff and Hofmann had for many years dealt with one another through Kuschke as above described, Kuschke selling goods from time to time for manufacture, and sending an invoice for the amount of the purchase-money, and the plaintiff usually paying at once and obtaining the usual discount, and from time to time, as he required the tobacco, sending to Hofmann the amount of duty and dock-dues in respect of the part he wished cleared, *which Hofmann would clear and [230 forward to Bolton. The tobacco would sometimes lie at the docks uncleared for a year or more. The plaintiff was not aware of what happened as regards the entries in the dock books. In fact the tobacco was left there in Hofmann's name, but entered in Hofmann's books as a sale to the plaintiff.

As regards the particular transaction in question in the cause, the facts admitted were as follows: On the 3d of December, 1875, Kuschke called on the plaintiff with samples of the 50 hhds. of tobacco in question, being Maryland tobacco, the property of Hofmann and his brother (who resided at Algiers). Kuschke offered it to the plaintiff as suitable to his trade at 8d. per lb., stating that *if there was too much he could sell it at a profit*. The plaintiff, after examining the samples, agreed to take the 50 hhds., and said *he would work them himself, but, if he should alter his mind, he would let Kuschke know*, adding "If you have any inquiries for Marylands, let me know."

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On Kuschke's return to town, an invoice was sent, dated the 3d of December, 1875, headed "Charles Johnson, bought of J. A. Hofmann & Co., 50 hhds. of Marylands" (and other tobacco). At the foot of the invoice was written "In bond. Two months prompt, or cash less 5 per cent. per annum for three months." It was agreed that £1,266 18s. 8d. was the price of the 50 hhds. in question, and that the whole of that price was paid by the 31st of December, 1875.

On the 9th of March, 1876, Hofmann absconded. On the 15th a petition was filed, and he was afterwards adjudged bankrupt on an adjudication founded on the absconding as the act of bankruptcy. At the time of the bankruptcy a large quantity of tobacco, besides the tobacco in question purchased by the plaintiff of Hofmann, some of it Marylands, remained undelivered, most of which was still standing in Hofmann's name at the bonded warehouses.

By an order of the Court of Bankruptcy this other tobacco was declared to be the plaintiff's as against the trustee (i.e., not to come within the reputed ownership clauses of the Bankrupt Act); but the defendants were no parties to that decision. It was discovered by the plaintiff that the 50 hhds. in question had before the bankruptcy been pledged by 231] Hofmann to the defendants as *security for advances made by them to him personally, together with a large quantity of tobacco not the plaintiff's. A portion of 42 hhds. of the plaintiff's tobacco had also been pledged to one Blumenthal, which formed the subject of an action tried before Field, J., in which judgment, after argument, was given for the plaintiff.

The defendants' counsel, having admitted all the above facts, proposed to add certain facts set forth in his statement of defence, which were admitted as follows: The defendants claimed to be entitled to retain the tobacco and the proceeds thereof in satisfaction or part satisfaction of moneys advanced by them, and alleged that the tobacco was transferred and delivered to them under the following circumstances: On the 24th of January, 1876, Hofmann, who was then a commission merchant and factor carrying on business in London under the name of J. A. Hofmann & Co., and who was also a large dealer in tobacco, applied to the defendants for an advance of £3,500 on the security of a pledge of tobacco stated by him to be his property and lying at the London and St. Katharine's Dock, and for which he held dock-warrants in his own name. He produced a list and valuation of the tobacco, being the memorandum of the 24th of January, 1876, hereinafter set forth, and in the list were included the

50 hhds. of tobacco erroneously described in the statement of claim as marked D G, but really marked D Q. The whole of the tobacco in the list was valued at £4,200, but the valuation of the 50 hhds. was only £1,250, or thereabouts. Hofmann then handed the defendants the list and valuation, of which the following is a copy: "Memorandum. From J. A. Hofmann and Co. to Crédit Lyonnais. 24th January, 1876." [Then followed an enumeration of the 50 hhds. and other tobaccos.] The defendants consented to make the advance, the terms of which were expressed in the following letter from them to Hofmann,—

"29 Mincing Lane, Jan. 24, 1876.

"Messrs. J. A. Hofmann & Co.

"Gentlemen,—By this we beg to acknowledge receipt of the following warrants for tobacco,—

"5 warrants, 50 hhds. ex Denmark.

[Here followed an enumeration of other tobaccos.]

*27 warrants, valued as per your statement at [232 £4,200, against which we handed you our check £3,000, being part of £3,500 that we have agreed to lend you for two months on deposit of warrants for tobacco of a sufficient value. Interest to be charged at 5 per cent. per annum, plus a commission of $\frac{1}{2}$ per cent. It is understood that the warrants will be at your disposal for the purpose of exchanging them for others, and that all valuations will be subject to our approval."

The 50 hhds. ex Denmark mentioned in the foregoing letter were the 50 hhds. marked D Q. The defendants accordingly advanced to Hofmann £3,000 on the 24th of January, 1876; and on the 9th of February, 1876, they advanced to Hofmann on the same terms and under the same circumstances as in the advance of £3,000 the further sum of £900 on the security of the tobacco already pledged and of 50 other hogsheads of tobacco then pledged with the defendants by Hofmann and valued at £1,280; and on the 19th of February, 1876, they advanced to Hofmann on the same terms and under the same circumstances the further sum of £800 on the security of the previous pledges and of certain other tobacco then pledged with the defendants by Hofmann, and valued at £1,680. Hofmann paid to the defendants on account of the said pledges sums of money amounting to £700, and received back from the defendants tobacco of greater value than the amount so paid by him; and at the time when Hofmann absconded he was indebted, and still is indebted, to the defendants in respect of the

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advances made on the security of the said pledges in the sum of £4,000, exclusive of interest, commission, and insurance. Hofmann on the 24th of January, 1876, transferred and delivered to the defendants five dock-warrants for the 50 hhds. of tobacco, each warrant being for ten hogsheads, in the name of Hofmann. At the time when the advances were made on the security of the pledge, the defendants believed the representations made to them by Hofmann that the 50 hhds. D Q were his property, and had no knowledge of the plaintiff's claim to them.

On the morning of the 14th of March, 1876, Hofmann had absconded, and it was generally known that that was the fact, and that his affairs were desperate. On the same day, and with knowledge of that fact, the defendants delivered up to the dock company *the five warrants for the 50 hhds. of tobacco D Q to be cancelled, and the tobacco was transferred into their name in the dock books on the 15th of March. The five warrants in the name of Hofmann were so delivered up and cancelled, and the tobacco so transferred as aforesaid, before any notice to the defendants and before any knowledge by the defendants that the 50 hhds. D Q were claimed by the plaintiff. According to the practice of the dock company, if the defendants after the transfer in the dock book had demanded fresh warrants, they would have received them as a matter of course.

On the 14th of March, 1876, the defendants wrote Hofmann a letter requesting him to forward them the dock samples of "the following tobacco, warrants for which we hold as security," and adding—"please note that the insurance against fire ceases on the 24th instant, and that we shall re-insure the tobacco on that date for whose account it may concern." The first five items mentioned in that letter are the 50 hhds. in dispute. This letter was written under the same circumstances as regards knowledge as stated above with regard to the delivery up of the warrants.

The interrogatories administered by the defendants to the plaintiff, and the answers thereto, were relied upon by the counsel for the defendants. I will state what I consider their effect to be in the course of what I have to say presently.

Such being the materials upon which my judgment is to be based, I will now state generally the contentions of the plaintiff and defendants respectively in the very able arguments they addressed to me. The plaintiff's counsel contended, in the first place, that the case was identical with

that of *Johnson v. Blumenthal*, and that it ought to be governed by the decision of Field, J., in that case.

To this contention two answers were given. First, as to the defence, paragraph 10, viz., that "Hofmann at the time of the pledge had received from the plaintiff actual or ostensible authority to deal with the goods as owner or as an agent entitled to sell or pledge them," it was said, and truly, that, in the case of *Johnson v. Blumenthal*, this question was disposed of by an express finding of the jury. It was also urged that the answers to interrogatories *which were [234 in evidence in the present case were not there in evidence, and constituted a material difference in the circumstances of the two cases. Secondly, as to the allegation that at the time of the pledge Hofmann was the plaintiff's factor or agent intrusted with the possession of the goods and of the documents of title thereto (paragraph 9), it was said that there was no such allegation upon the pleadings in the former case, and therefore the question could not have been decided upon the Factors Acts.

Under the circumstances, I think it better to give my judgment upon both questions upon the facts of the present case, without assuming that *Johnson v. Blumenthal* is so identical as to dispose of this case, though it may be found, when that case comes to be reported, that it is undistinguishable. If I had been able to obtain any report of the facts and judgment in that case, and found it to be undistinguishable, I should have declined to hear any argument, and decided in favor of the plaintiff, leaving the defendant to appeal; for, I am of opinion that the Appellate Jurisdiction Act, 1876 (¹), would be seriously crippled in its application, if single judges were not to hold themselves bound by the decisions of other single judges on the same questions, to the same extent as the superior courts were in the habit of doing before the Judicature Act.

It having been admitted upon the trial, by the withdrawal of the two first paragraphs of the statement of defence, that the plaintiff had about December the 3d, 1875, become the absolute owner of the 50 hhds., and that the transfer and delivery of the tobacco and documents by Hofmann to the defendants was without any authority from and in fraud of the plaintiff, this case starts with the *onus* strongly upon the defendants to make out either of their defences.

In support of the defence set up in the 10th paragraph, the defendants' counsel relied strongly on the plaintiff's

(¹) 39 & 40 Vict., c. 59.

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answers to the second and third interrogatories. Those questions and answers were as follows:—

Q. Did not the said J. A. Hofmann, at the time of the purchase by you in the statement of claim alleged, inform you, or were you not aware, that Hofmann 235] *had in his possession five dock-warrants dated the 22d of November, 1875, for the 50 hhds. of tobacco the subject of this action, in his own name, whereby the said tobacco was deliverable to Hofmann or his assigns by indorsement on the said warrants, or how otherwise?

A. The said J. A. Hofmann did not at the time of the purchase by me in the statement of claim alleged, or at any other time, inform me, nor was I aware, that Hofmann had in his possession the five warrants in the second interrogatory mentioned, or either of them, in his own name, whereby the said tobacco was deliverable to Hofmann or his assigns by indorsements on the said warrants: but, when I bought and paid for the 50 hhds. of tobacco in the third interrogatory mentioned, I assumed and believed that the same (and the warrants, if any, representing them) were in the possession and control of Hofmann; and I so believed on the 24th of January, 1876.

Q. Did not the said 50 hhds. and the said dock-warrants respectively to your knowledge and with your consent remain in the name and possession or under the control of Hofmann? and were they not to your knowledge and with your consent in his name and possession or under his control on the 24th of January, 1876, or how otherwise?

A. I left the said tobaccos in the possession of Hofmann as my agent to forward the same to me as and when I might require them or any of them for the purposes of my trade, or to forward them to any person to whom they might be sold: but I had no actual knowledge as to whether he had such possession and control, and, except as herein appears, I did not consent to his having possession and control thereof.

Coupling these questions and answers with the other facts admitted in the case, I am not able to draw any inferences at all unfavorable to the plaintiff beyond what are to be drawn from the fact that, having bought from Hofmann and paid for the tobacco in question by the 31st of December, 1875, he left the tobacco in bond in Hofmann's name, and assumed that Hofmann still retained possession and control of any documents representing the tobacco, as his agent *for the purpose of forwarding the tobacco* to him as he might require it for the purposes of his trade, or to forward it to any persons to whom the plaintiff might sell the tobacco. I see nothing in these answers to induce me to qualify any of the admissions made with regard to the ordinary dealings between the plaintiff and Hofmann, or with regard to the particular transaction.

The defendants' counsel also relied upon the conversation between Kuschke and the plaintiff on the 3d of December, 1875: but it appears to me that no inference can be drawn from that conversation, in the absence of any evidence that the plaintiff ever reopened the transaction, inconsistent 236] with the application of the *general course of dealing between the parties, according to which this was clearly a complete purchase of the tobacco by the plaintiff from

Hofmann at least as early as the 31st of December, 1875; the only authority left in Hofmann being to clear the goods from time to time as the plaintiff might require them, and forward them to him or his purchasers.

Under these circumstances, the defendants' counsel contended that the plaintiff cannot succeed, because, having armed Hofmann with the *indicia* of property in the goods, and so enabled him to commit a fraud, he has disentitled himself to recover against a *bona fide* pledgee of the goods; and they cited several cases in support of this contention. Amongst others, *Boyson v. Coles* ⁽¹⁾ was relied upon, for the question there left to the jury by Lord Ellenborough: but the decision of that case appears to me to be rather an authority for the plaintiff than for the defendants. The decision was in favor of the plaintiff, and the court held that the pawnee could not obtain a better title than the pawner, unless the real owner had armed the latter with some document which necessarily indicated an intention to transfer the actual property as distinguished from the possession of the goods. In the present case, looking at the usage in the trade and the previous relations between the parties, as well as the particular transaction itself, I am of opinion that neither in fact nor in law did the plaintiff arm Hofmann with the *indicia* of property, in the sense in which those words are used in the cases which were cited. Relying upon the honesty of Hofmann, he left the goods which he had bought of him in bond, trusting to Hofmann to forward them to him from time to time as they might be required by him, and for that reason only not insisting on the possession of any warrants or a transfer in the books of the company. And this was done in accordance with a usage so prevalent in the trade that the contrary is admitted to be "the exception."

Independently of the Factors Acts, the mere possession of the dock-warrants is nowhere made conclusive as to the application of the rule acted upon in *Pickering v. Busk* ⁽²⁾: but it is for the jury to say whether the plaintiff has so conducted himself as to have lost the right to follow his own goods into the hands of the *purchaser or pledgee. [237 Under the facts stated in the present case, I should not as a jurymen think that the plaintiff had so conducted himself: and I must therefore hold that the defendants are not entitled to succeed upon the ground stated in the 10th paragraph of their defence.

With regard to the 9th paragraph of the defence, setting

⁽¹⁾ 6 M. & S., 14.

20 ENG. REP.

⁽²⁾ 15 East, 38.

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up the sale to the defendants as one made by Hofmann as the plaintiff's "factor or agent intrusted with the possession of the goods and the documents of title thereto," I also think the defendants are not entitled to succeed, but that the case is governed by the authority of *Cole v. North Western Bank*⁽¹⁾. In fact, I think it is a stronger case for the plaintiff than that was. The defendants upon this point also relied upon the answers to interrogatories Nos. 4 and 5⁽²⁾; but I can find nothing in them which was not already stated in the admissions made. Upon those admissions, drawing such inferences as appear to me to be correct, the positions of Hofmann and the plaintiff respectively seem to be these: Hofmann was a factor and commission agent in London; but he was also a large tobacco merchant on his [238] own account. So far *as the transaction in question was concerned, and generally in his transactions with the plaintiff, he was a mere vendor to the plaintiff who received cash for discount on each transaction, but who was, in accordance with the practice of the trade (not invariable, but most usual), left in the possession of the goods in bond, so as to avoid premature payment of the duty; undertaking (with other customers for a commission, but for the plaintiff, in consideration of his distant residence and the expense of carriage, for nothing) to clear the goods for the plaintiff or other purchasers, and forward them to him or them, or his or their customers, as required. There was nothing in the case to show the plaintiff that Hofmann treated the goods as in any other sense at his disposal. Nor was there anything as regards the goods in question to show

(1) Law Rep., 9 C. P., 470; on appeal, Law Rep., 10 C. P., 354.

(2) The 4th and 5th interrogatories and the answers thereto were as follows:—

Q. Was not Hofmann intrusted by you with the possession of the said 50 hhds. and the said dock-warrants, or did not you allow him to retain the possession of the same as your factor or agent? State fully the circumstances under which he was so intrusted by you or authorized to retain possession and the purpose or object thereof; and would not Hofmann have been entitled to receive from you some and what commission as your factor or agent in respect of his clearing the tobacco or some part thereof from the customs or paying the duties thereon from time to time, or how otherwise?

A. In answer to the fourth interrogatory, I refer to my last preceding answer. Hofmann would not have been

entitled to any commission in respect of clearing the goods at the customs or making payments on account of duty or forwarding the tobacco, he having agreed with me some time previously, on my complaining that I did not like buying London tobacco, on account of the excessive carriage to Bolton, that he would not charge me the usual commission of 1s. per package for clearing the goods.

Q. Was not the said tobacco insured by Hofmann, and to your knowledge in his own name? and did he not pay the premium or premiums in respect of such insurance, or how otherwise?

A. I did not instruct Hofmann to insure the tobacco, and I do not know that he did insure it. Hofmann did not that I know of charge me with the premiums; but whether he himself paid them or not I cannot say. I do not know in whose name the tobacco was insured, if at all.

the plaintiff that Hofmann retained, or supposed that he retained, any interest in them, or to authorize Hofmann in so supposing. Under these circumstances, the defendants on the 24th of January, 1876, advanced to Hofmann £3,500 on the security of these amongst other goods, and he transferred to them the dock-warrants relating to them.

I heard a very able argument by Mr. Woolf on behalf of the defendants to the effect that it was not necessary, in order to validate a pledge by a factor, that he should be a factor intrusted to sell; and he raised again and discussed many questions of great nicety which have arisen upon the construction of the Factors Acts: but the result of his argument was to satisfy my mind that the only real question in this case was rather a question of fact than one of law, viz., in what capacity was Hofmann intrusted by the plaintiff? Upon this question I have no doubt whatever that the proper answer to give upon the facts admitted and proved is, that the only capacity in which Hofmann had any possession of the goods after the 31st of December, 1875, was that of a paid vendor, still retaining the dock-warrants solely for the convenience of the vendee, who preferred to postpone the time of delivery. I do not think he was in any sense an agent *quâ* sale or pledge or dealing of any kind of or in the goods. This being so, I think the argument of Mr. Bigham, who replied on behalf of the plaintiff, was well founded, and that, inasmuch as the practice which prevailed was shown to be an ordinary practice in the trade, and one *which [239 had been acted on between Hofmann and the plaintiff for years, the case of *Cole v. North Western Bank* ⁽¹⁾ applies, and that it cannot be said that Hofmann in the present case was "an agent intrusted with the possession" of the goods within the Factors Act, any more than Slee was in that case. Hofmann, indeed, was not intrusted with the goods for any purpose at all, except to clear them and forward them upon receipt of instructions, which he never received.

Upon these grounds I hold that the plaintiff is entitled to judgment.

*Judgment for the plaintiff for £1,250 18s. 8d.,
with costs: Execution stayed on the money
being paid into court within a week.*

Solicitors for plaintiff: *Chester, Urquhart, Mayhew & Holden*, for Bailey & Read, Bolton.

Solicitors for defendants: *Michael Abrahams & Roffey*.

⁽¹⁾ Law Rep., 9 C. P., 470; on appeal, Law Rep., 10 C. P., 354.

[2 Common Pleas Division, 239.]

Jan. 13, 1877.

HUMPHRIES V. COUSINS.

Duty and Liability of Owners of adjoining Premises as to Nuisance.

The plaintiff and the defendant were respectively occupiers of adjoining houses. An old drain which commenced on the defendant's premises, and thence passed under and received the drainage of several other houses, turned back under the defendant's house, and thence under the cellar of the plaintiff's house, and ultimately into a public sewer. The part of the return drain which passed through the defendant's premises being decayed, the sewage escaped and flowing into the plaintiff's cellar did damage. The defendant was unaware of the existence of this return drain, and consequently of its want of repair :

Held, that the defendant was liable for the damage done to the plaintiff: for that defendant's duty was to keep the sewage which he himself was bound to receive from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel, and that this duty was independent of negligence on his part, and independent of his knowledge or ignorance of the existence of the drain.

CLAIM. That in June, 1875, the plaintiff was the occupier of a public house, the Old Red Lion, No. 339 Strand, and the defendant was the occupier of No. 6 Helmet Court, Strand, which adjoins the public house of the plaintiff. 240] Through the negligence of the *defendant in not keeping in a proper state of repair the drains, parcel of his said house, large quantities of the water, filth, and drainage of the defendant coming and brought by him in and upon his said house and in his drains, and which were entitled to flow through his drains, and ought to have flowed through the same into the common sewer without causing any inconvenience to the plaintiff, ran and flowed from the drains, &c., of the defendant into and upon the said public house of the plaintiff and the cellars of the plaintiff therein, and flooded, damaged, and injured the stock-in-trade, &c. Claim, £300.

The defence denied that the defendant did not keep in a proper state of repair his house, No. 6 Helmet Court, Strand, or the water-pipes, drains, &c., or that he was guilty of negligence in respect of any of the same; and also denied the damage to the plaintiff.

At the trial before Blackburn, J., at the last Trinity sittings at Westminster, it appeared that the plaintiff and the defendant were respectively tenants and occupiers of adjoining houses, as stated in the claim. Under the premises of the defendant was an old drain which passed thence through several other houses, receiving the sewage of each, then turned back through the defendant's premises, passed under

the plaintiff's cellar, and thence away to a public sewer. The fact of the drain turning back through his premises was unknown to the defendant; nor was he aware that it was out of repair; but, by reason of the defective state from age and want of repair of the return drain under the defendant's premises, the water and sewage from it flowed through the party wall into the plaintiff's premises, and caused the damage complained of.

The jury found that the defective state of the drain was not attributable to any negligence on the part of the defendant; and they assessed the damages sustained by the plaintiff at £30.

Nov. 10. *Talfourd Salter*, Q.C., moved for judgment for the plaintiff for the damages found by the jury: Upon the authority of *Tenant v. Goldwin* ⁽¹⁾, *Hodgkinson v. Ennor* ⁽²⁾, and *Fletcher v. Rylands* ⁽³⁾, it being admitted that the sewage escaped from the defendant's premises into [241] those of the plaintiff, and that the cause of that escape was the defective state of a drain under the defendant's premises, the defendant is responsible for the damage so occasioned; and it was no answer for him to say that the overflow was not caused by any voluntary negligence on his part, or that he did not know of the existence of the drain.

Nov. 15. *Robinson*, Sergt., and *Shortt*, showed cause: To render the defendant liable for the injury complained of, it must be shown that he was aware of the existence of the drain: *Chadwick v. Trower* ⁽⁴⁾; *Hammond v. St. Pancras Vestry* ⁽⁵⁾; *Colebeck v. Girdlers Co.* ⁽⁶⁾. That was not only not shown, but it was distinctly negatived by the jury. The question is whether there is an absolute liability cast upon the occupier of a house to keep a drain in repair, merely because it passes through his premises without doing him any service. In *Tenant v. Goldwin* ⁽¹⁾ and *Fletcher v. Rylands* ⁽³⁾ the defendants brought the nuisance to the spot: see the observations on *Tenant v. Goldwin*, in *Gale on Easements*, 5th ed., p. 487. This "drain," as it is called, was in truth a "sewer:" see 18 & 19 Vict. c. 120, s. 250 ⁽⁷⁾.

[DENMAN, J.: That point was not taken at the trial, and therefore cannot be urged here. It appears from the learned judge's notes that it was agreed on both sides that the only question was whether a person having a drain under his house is not bound to keep it so as not to do injury to his

⁽¹⁾ 2 Ld. Raym., 1089; 1 Salk., 360.

⁽²⁾ 4 B. & S., 229; 32 L.J. (Q.B.), 231.

⁽³⁾ 3 H. & C., 774; Law Rep., 1 Ex., 265; Law Rep., 3 H. L., 330.

⁽⁴⁾ 6 Bing. N. C., 1.

⁽⁵⁾ Law Rep., 9 C. P., 316.

⁽⁶⁾ 1 Q. B. D., 234.

⁽⁷⁾ See note at the end of the case.

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neighbor, although he has been guilty of no negligence, and the existence of the drain was not in any way known to him.]

In *Ross v. Fedden* (¹), the plaintiff occupied for business purposes the ground floor and the defendants the second floor of the same house, respectively, as tenants from year to year. There was a water-closet on the defendant's premises to and of which they alone had access and use. After the premises had been closed on a Saturday evening, water percolated from the water-closet through the first floor to the plaintiff's premises and caused damage to his stock-in-242] trade. The overflow of water was *owing to the valve of the supply pipe to the pan of the closet having got out of order and failed to close, and the waste pipe being choked with paper. The defects could not be detected without examination, and the defendants did not know of them, and were guilty of no negligence; and it was held that there was no obligation on the defendants to keep in the water at their peril, and that they were not liable to the plaintiff for the damage.

[DENMAN, J., referred to *Bell v. Twentymen* (²) and also to *Hodgkinson v. Ennor* (³), where Blackburn, J., says (⁴): "I take the law to be as stated in *Tenant v. Goldwin* (⁵), that you must not injure the property of your neighbor, and consequently, if filth is created on any man's land, then, in the quaint language of the report in Salk., 361, 'he whose dirt it is must keep it that it may not trespass.'"]

Talfourd Salter, Q.C., and *C. Scott*, in reply: If this case is brought within the judgment of Lord Holt in *Tenant v. Goldwin* (⁶) as accepted and expressed by Blackburn, J., in *Fletcher v. Rylands* (⁷), and in other cases, and assented to by Lord Cairns, L.C., in the House of Lords (⁸), the plaintiff is entitled to the judgment of the court. It is agreed that the damage done to the plaintiff arose from the sewage coming from the defendant's premises, that the cause of its escape was that the drain under the defendant's premises was out of repair, and that the defendant, being the occupier of the premises, was bound to repair it, that being a duty which the law casts upon him, and from the performance of which his ignorance of its existence does not excuse him. He has failed to perform the obligation which the law casts

(¹) Law Rep., 7 Q. B., 661.

(²) 1 Q. B., 766.

(³) 4 B. & S., 229; 32 L. J. (Q.B.), 231.

(⁴) 4 B. & S., at p. 241; 32 L. J. (Q.B.), at p. 236.

(⁵) 2 Ld. Raym., 1089; 1 Salk., 360.

(⁶) Law Rep., 3 Ex., at p. 283, *et seq.*

(⁷) Law Rep., 1 H. L., 339.

upon him of taking care that his filth does not injure his neighbor. In *Broder v. Saillard* ⁽¹⁾, it was held that the occupier of a house is liable if he allows the continuance on his premises of an artificial work which causes a nuisance to a neighbor, even though it has been put there before he took possession.

Cur. adv. vult.

*Jan. 13. The judgment of the Court (Denman [243 and Lindley, JJ.) was delivered by

DENMAN, J.: The plaintiff and the defendant in this case are tenants and occupiers of adjoining houses; and the plaintiff, upon the facts and findings of the jury, now complains of injuries caused to his premises and stock-in-trade by water and sewage coming into his cellar from the defendant's premises. The jury have found in effect that the injuries complained of were so caused, and have assessed the damages sustained by the plaintiff at £30. The plaintiff has moved for judgment for the amount of the damages so assessed.

The facts relied on as a defence to the action are in substance as follows: An old drain which commenced on the defendant's premises and received his sewage, ran under and received the sewage of several other houses, turned back through the defendant's premises, ran under the plaintiff's cellar, and then away to a main sewer. This drain was not known to the defendant to turn back and run through his premises under those of the plaintiff, and was not known to be out of repair. It was, however, in fact out of repair by reason of age and wear and tear; and its defective state under the defendant's premises was the real cause of the mischief. The jury found that the defective state of the drain was not attributable to any negligence of the defendant.

Upon these facts, it is to be observed at the outset that the water and sewage which injured the plaintiff came on to the defendant's land by an artificial drain, made for the convenience of the defendant and the other persons whose houses were higher up. We have not, therefore, to deal, as the court had in *Smith v. Kenrick* ⁽²⁾, with the case of water or other matter coming naturally from or through the defendant's land on to the plaintiff's. Bearing this in mind, it appears to us that it is incumbent on the defendant to show what right he had to allow the filth brought artificially on his land to escape on to the land of the plaintiff.

The *prima facie* right of every occupier of a piece of land

⁽¹⁾ 2 Ch. D., 692.

⁽²⁾ 7 C. B., 515; 18 L. J. (C.P.), 172.

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is, to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to 244] receive such matter; but *the burthen of showing that he is so bound rests on those who seek to impose an easement upon him. Moreover, this right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it.

That these are the rights of an occupier of land appears to us to be established by the cases of *Smith v. Kenrick* (¹), *Baird v. Williamson* (²), *Fletcher v. Rylands* (³), and the older authorities there referred to, and the recent decision of *Broder v. Saillard* (⁴).

In the present case, the plaintiff was bound to receive sewage from the defendant's land through the old drain, but not otherwise; he was not bound to receive it through the surrounding earth or the party wall, through which in fact it came. Further, as the plaintiff was the occupier of a servient tenement, he was clearly not bound to repair the drain on any of the dominant tenements. The plaintiff's rights, therefore, have been infringed, and the loss he has sustained cannot be said to be *damnum absque injuria*. (See the note to *Ashby v. White* in 1 Sm. L. C., 284, 7th ed.)

But the question still remains, has the defendant infringed those rights, and is he the person liable for the infringement? It is said this case is not like *Tenant v. Goldwin* (⁵) or *Fletcher v. Rylands* (⁶), because in both of those cases the defendant himself brought on his land that which occasioned the mischief; whereas, in this case, the defendant received the sewage, and was bound so to do. So far, however, as we can judge, some of the sewage must in fact have come from the defendant's own premises in the first instance. But, even if this is not to be taken as proved, we are of opinion that, as between the plaintiff and the defendant, it was the defendant's duty to keep the sewage which he was himself bound to receive from passing from his own premises 245] to *the plaintiff's premises, otherwise than along the old accustomed channel. This duty is incidental to the defendant's possession of land (see *Russell v. Shenton* (⁷),

(¹) 7 C. B., 515; 18 L. J. (C.P.), 172.

(⁴) 2 Ch. D., 692.

(²) 15 C. B. (N.S.), 376; 33 L. J. (C.P.), 101.

(⁵) 2 Ld. Raym., 1089; 1 Salk., 360.

(⁶) 3 Q. B., 449.

(³) 3 H. & C., 774; Law Rep., 1 Ex., 265; Law Rep., 3 H. L., 330.

and is the necessary consequence of the right of the plaintiff. That duty, like its correlative right, is independent of negligence on the part of the defendant, and independent of his knowledge or ignorance of the existence of the drain. The duty of the defendant himself to receive the sewage evidently did not depend on such knowledge; and the fact that he unknowingly received it affords no justification for allowing it to escape in a manner in which he had no right to let it pass. *Fletcher v. Rylands* ⁽¹⁾ is a strong authority to show that this conclusion is correct; for, although in that case the defendant knew of the existence of his reservoir, he did not know that the ground underneath it was in such a state as to render its existence dangerous; and it was strenuously but ineffectually urged that he could not be liable in respect of damage caused by a state of things of which he knew nothing. *Bell v. Twentymen* ⁽²⁾ is a strong authority to the like effect. Indeed, if it be once established that the plaintiff's rights have been infringed by the defendant, and that the plaintiff has been thereby damnified, the fact that the defendant infringed them unknowingly and without negligence cannot avail him as a defence to an action by the plaintiff: see *Lambert v. Bessey* ⁽³⁾. In short, we think that the true doctrine is contained in the following passage of the judgment of Blackburn, J., in the case of *Hodgkinson v. Ennor* ⁽⁴⁾,—"I take the law to be as stated in *Tenant v. Goldwin* ⁽⁵⁾, that you must not injure the property of your neighbor, and consequently, if filth is created on any man's land, then, in the quaint language of the report in Salk. 361, 'he whose dirt it is must keep it that it may not trespass.'"

The case of *Hammond v. St. Pancras Vestry* ⁽⁶⁾, which was relied upon by the counsel for the defendant, appears to us to have no real bearing upon the present case, inasmuch as the whole argument and decision of that case turned upon the effect of the *clauses of a particular act of [246 Parliament imposing certain duties upon a public body; and no question arose as to the common law liability of the occupiers of adjoining premises. (See the judgment of Brett, J. ⁽⁷⁾)

It was contended that the present case was governed by *Ross v. Fedden* ⁽⁸⁾; but that was a case in which the plaintiff and the defendant occupied separate stories in the same house; and it was expressly distinguished from a case like

⁽¹⁾ 3 H. & C., 774; Law Rep., 1 Ex., 265; Law Rep., 3 H. L., 330.

⁽²⁾ 1 Q. B., 766.

⁽³⁾ Sir T. Raym., 421.

⁽⁴⁾ 4 B. & S., at p. 241; 32 L. J. (Q.B.), at p. 236.

⁽⁵⁾ 2 Ld. Raym., 1089; Salk., 21, 360; 6 Mod., 311; Holt, 500.

⁽⁶⁾ Law Rep., 9 C. P., 316.

⁽⁷⁾ Law Rep., 9 C. P., at p. 322.

⁽⁸⁾ Law Rep., 7 Q. B., 661.

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the present, which depends simply on those principles of law which regulate the rights and duties of occupiers of adjacent pieces of land. The case of *Carstairs v. Taylor* ⁽¹⁾ is also clearly distinguishable on the same ground.

The question whether the defendant was bound, as between himself and the plaintiff, to repair the drain, or so much of it as ran under the defendant's land, was much discussed, but does not really arise; for, the plaintiff's cause of action as finally relied upon is, not that the defendant omitted to repair the drain, but that he omitted to prevent the sewage on his land from coming on the plaintiff's land otherwise than as the plaintiff was bound to receive it. If the defendant had prevented the sewage from so coming, the plaintiff would have had no cause of action, whether the drain was repaired by the defendant or not.

The defendant may perhaps be entitled, as between himself and the owners and occupiers of the other dominant tenements, to call upon them to contribute to the expenses of keeping his and their common drain in repair; and it may be that the plaintiff might have sued all those owners or occupiers (including the defendant) for the damage which he has sustained by reason of such non-repair. But, even if the plaintiff could have sued them all, he was not in our opinion bound to do so: he was not bound to rest his case on his ability to establish a duty on them to repair the drain, and a breach of such duty by all who used it.

Lastly, it was contended that, as the defendant was only a tenant, and not an owner, he was not responsible: but he was in point of law tenant in possession, not only of the surface, but of whatever was beneath it, and as such responsible to the plaintiff: see **Russell v. Shenton* ⁽²⁾; and he could himself have maintained an action for any invasion of such possession.

For these reasons, our judgment is for the plaintiff.

Judgment for the plaintiff ⁽³⁾.

Solicitors for plaintiff: *Thomas Beard & Son*.

Solicitors for defendant: *Halse, Trustram & Co*.

⁽¹⁾ Law Rep., 6 Ex., 217.

⁽²⁾ 3 Q. B., 449.

⁽³⁾ The defendant appealed; and his counsel again took the point that the drain in question was a sewer within the definition of s. 250 of 18 & 19 Vict. c. 120, and was vested either in the vestry or the district board under s. 68.

Counsel for the plaintiff admitted that the objection would be fatal, but urged that it was too late to take the defence, as it was not raised by the pleadings nor taken at the trial.

The Court of Appeal intimated that a *stet processus* was the best course for all parties, which was accordingly assented to.

See 14 Eng. Rep., 543 note; 16 Eng. Rep., 298 note; 19 Eng. Rep., 340 note.

[2 Common Pleas Division, 247.]

Feb. 6, 1877.

[IN THE COURT OF APPEAL.]

FRENCH and Another v. GERBER and Others (').*Shipping—Charterparty—Cesser of Liability—Demurrage—Lien.*

Defendants chartered plaintiffs' ship to carry a cargo of rice to a good and safe port, calling at another port for orders which were to be forwarded within forty-eight hours after notice of her arrival or lay-days to count. Twelve working laying days to be allowed the freighters for loading the ship at port of loading and waiting for orders at port of call, and fifteen days on demurrage allowed over and above the laying days, at 4*d.* per ton per day. It was further agreed "that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise." The ship arrived at the port of call with a cargo worth the freight, and notice was given to the defendants.

In an action against the charterers (who had sold the cargo before arrival at the port of call) two breaches of contract were assigned: 1, that the defendants did not give orders as to the ship's port of discharge; 2, that they gave orders for the ship to discharge at a port which was not a good and safe port; whereby the plaintiffs were delayed and put to expense in obtaining payment of the freight:

Held, affirming the judgment of the Common Pleas Division, that the exoneration clause discharged the defendants from liability for the breaches.

DECLARATION that the plaintiffs, owners of the ship *Theresa*, by the master, and the defendants, by Burot, Gerber & Co., their *agents at Akyab, entered into a charterparty of which the following are the material parts:—

"Akyab, 8th April, 1874.

"It is this day mutually agreed between Mr. R. C. Downie, in command of the ship *Theresa*, now off Akyab, and Messrs. Burot, Gerber & Co., of Akyab, merchants and freighters, that the ship shall with all convenient speed sail and proceed to a loading berth in the port of Akyab, and load from the agents of the freighters a full and complete cargo of rice, in bags as usual, and being so loaded, shall therewith proceed with all dispatch to Queenstown or Falmouth (at the option of the master) for orders, to be forwarded within 48 hours after notice of said arrival has been given to and received by charterers' agents in London, or lay-days to count, to discharge at a good and safe port in the United Kingdom, or on the continent, between Bourdeaux and Hamburg, both inclusive, or so near thereunto as she may safely get, and deliver the same in any dock freighters may appoint, always afloat, agreeably to bills of lading, on being paid freight in full of all, &c., at the rate of 60*s.* sterling per ton of 20 cwt. net delivered. . . . Twelve working laying days (Sundays excepted) are to be allowed the freighters for loading the said ship at port of loading and waiting for orders at port of call in Europe, to commence and to be computed 24 hours after the master has given notice in writing to charterers' agents that the ship is ready to receive cargo; and 15 days on demurrage are allowed over and above the said laying days at 4*d.* per register ton per day. . . . The captain to sign bills of lading for his cargo at no lower rate of freight than stipulated in this charterparty; failing which charterers shall not be responsible for such difference. . . . All questions of general average to be settled accord-

(¹) Affirming 18 Eng. Rep., 286.

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ing to the custom of the London underwriters at Lloyd's Freighters to have the power of underletting the whole or part of the vessel. . . .

"It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise."

That the *Theresa* was loaded with a cargo of rice and proceeded to Falmouth, and on her arrival due notice was given to defendants or their agents. First breach, that the defendants or their agents did not give and refused to give orders as to the port of discharge. Second breach, that the defendants gave orders for a port of discharge which was not a good and safe port. Whereby the plaintiffs were delayed, and incurred expense in obtaining payment of the freight.

Plea, that the cargo was sold by defendants before arrival, and was worth the freight at the port of discharge, by reason of which defendants' liability under the charterparty ceased.

Demurrer and joinder.

The Common Pleas Division held that the defendants were 249] by *the clause of exoneration discharged from liability for both breaches (').

The plaintiffs appealed.

French and *Granger*, for the plaintiffs: The clause of exemption from liability is common in charterparties, and is intended to give the charterer power to stop the ship if he feels doubtful of the solvency of the buyer, but it is not intended to relieve the charterer from liability except so far as the lien extends. The whole clause must be read together, and then it is clear that the relief from liability is only coextensive with the lien: *Kish v. Cory* ('). It is absurd to suppose that the shipowners have exposed themselves to possible loss, and have abandoned all claim to compensation. The clause in *Sanguinetti v. Pacific Steam Navigation Co.* (') was different. *Gray v. Carr* (') and *Francesco v. Massey* (') show the meaning which has been put on such clauses. There is another form of charterparty, as in *Melvain v. Perez* ('), under which no doubt all liability does cease when the ship is loaded; but that is not the form used here, and there are many parts of this charter which can be performed only after the ship has been loaded, and as to which it cannot be supposed that the shipowners have left themselves at the mercy of the charterer.

J. C. Mathew, for the defendants: This charter must be

(1) 1 C. P. D., 737; 18 Eng. Rep., 294.

(2) Law Rep., 10 Q. B., 553.

(3) 2 Q. B. D., 238.

(4) Law Rep., 6 Q. B., 522.

(5) Law Rep., 8 Ex., 101.

(6) 3 E. & E., 495; 30 L. J. (Q.B.), 90.

read as it stands, and there is no reason to suppose that the parties did not mean it to say what it does say, and that the shipowners were not, for the sake of getting the freight, content to run the risk of a loss which would be incurred in very few cases. There is nothing to confine the exemption to breaches which occurred before the ship was loaded, or to those for which a lien is given. All these things must have been considered, for the exemption is not absolute, but arises only if the cargo is of sufficient value.

French, in reply.

MELLISH, L.J.: I am of opinion that the judgment of the Common Pleas Division ought to be affirmed. [The Lord Justice stated the nature of the action and of the defence.] There *have been many cases as to clauses of this [250 description, and no doubt it has been held in several of them that the exoneration from liability ought not to be extended beyond the lien. That principle has been laid down exclusively in cases where the breach occurred before the loading, yet the courts have always tried to reconcile the whole charter and to make the liability coextensive with the exoneration. For that purpose the courts have extended the words of the clause giving the lien, and have sometimes made the lien for demurrage include the lien for detention in the nature of demurrage. We ought, therefore, in construing this charter, to see whether we cannot give a reasonable construction to the whole, taking the words of exoneration in their natural sense, which seems to discharge the charterers from all liability whatever; and at the same time we ought to see how far the lien can be extended, so as to give the shipowners an adequate remedy for any breach of the charter of which they may be entitled to complain.

The breaches complained of relate exclusively to the charterers not having given proper orders at the port of call. Now, the charter does provide a remedy—which may be sufficient or insufficient, but still is a remedy—independently of the mere contract, viz., that if the charterers do not give notice of the port of discharge within forty-eight hours after they or their agents have received notice of the arrival at the port of call, then the lay-days are to count. But the charter does not stop there, because it says in a subsequent part that certain days on demurrage are to be allowed to the freighters over and above the lay-days, which shows clearly that if the charterers do not give notice in due time the lay-days are to count, and if the lay-days are exhausted, then the demurrage days are to count.

The question, to my mind, is whether the parties have not

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reasonably supposed that that was a sufficient remedy for any inconvenience or damage which the shipowners were likely to sustain, from not getting proper orders as to the port of discharge. It appears to me that they may have reasonably supposed that it would be so. The charter was a rice charter; it contemplated that bills of lading were to be signed, and that the charter might be underlet; it was also probably within the contemplation of the parties that the 251] charterers might sell this cargo while it was on *the passage, and it would be in the ordinary course of business that they should do so. Their object in having this particular clause inserted in the contract is plainly that when they have loaded the cargo, and the ship is dispatched, and they sell the cargo, they may be entirely free from the matter, and the shipowners may look for their remedy against the persons purchasing the cargo. If there was some clause in the charter upon which it was perfectly plain that no remedy was given by the lien as against the purchaser of the cargo, then I certainly should have struggled to hold that this clause could not exonerate the charterers from paying damages. But when I see what the breaches in this case are, and that they are breaches which are provided for, and intended purposely to be provided for, so that the shipowners may have a remedy, not only against the charterers, but against whoever may be the owner of the cargo, it appears to me that the charterers purposely inserted that which they considered would be a sufficient remedy, and I think it is a sufficient remedy for the shipowners in respect of those breaches, and that it would be wrong to hold that the charterers were still liable for those breaches.

In my opinion, according to the plain meaning of the words, they should be discharged. Mr. French, with great ability, went all through the clauses of the charter, for the purpose of finding some in which there was an agreement on the part of the charterers to do something after the vessel was loaded, in respect of which the shipowners would have no remedy, if the clause of exoneration is to be construed generally. He relied upon the clause about the average, to be settled according to the custom at Lloyd's, but I do not think that that makes any difference. It is true that the charter does not say in terms how the average should be stated; but I think that the shipowners have their remedy against the owners of the cargo in respect of that. I cannot find that this charter does in substance contain any clause as to damages, which is so plainly not covered by the lien that one may fairly say that the parties cannot have in-

tended what they have apparently said, namely, that the charterers should be entirely exonerated. The true construction of the charter appears to me to entirely exonerate them in respect of subsequent *breaches, and there- [252 fore I think that the decision of the court below should be affirmed.

BAGGALLAY, L.J.: As my colleagues concur in the opinion that the judgment of the Common Pleas Division should be affirmed, it is immaterial whether the doubts which I entertain upon the subject are well or ill founded. In all probability they are ill founded; but I do at the present moment entertain some doubts upon the question.

I think that the strength of the argument which Mr. French has addressed to us is upon the construction of the exoneration clause, for I am not much pressed with the argument which he has addressed to us upon what he called the special contracts of the charterparty. Perhaps the most effective argument was that founded on the clause which provided that orders should be forwarded forty-eight hours after the arrival at the port of call. But I think that Mr. Mathew has given a good answer—that the exemption from liability was not to take place in the event of the cargo becoming of less value than the freight. Then as regards the construction of the exoneration clause, I think that the effect of the decisions which have been cited in the course of the argument amounts to this, that the exoneration from liability is coextensive with the creation of the lien. It is true, as has been pointed out, that these decisions have been given in cases of liability accruing before loading, but I do not feel satisfied that there should be any distinction drawn in that respect between liabilities accruing before and those accruing after loading.

But I entertain a further doubt, which operates in the other direction. Assuming that the exoneration is limited to the extent to which the lien is created by the clause in question, I doubt whether the damages which have been sustained in this case are not in point of fact such as would be covered by the lien which is given. I do not feel satisfied upon that point; if I did my judgment would in no respect differ from the conclusions at which my colleagues have arrived.

BRAMWELL, L.J.: If I had known that Sir Richard Baggallay entertained doubts to the extent he has expressed, I should have wished to take time to consider whether my own opinion was well *founded, but as it is I must [253 give utterance to it. Now I think that there was here a contract to give notice within forty-eight hours, or, at all

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events, that there was what would be a contract to give notice within a reasonable time, of a port of discharge. I think that, if the agent of the charterers said, "We will not tell you the port of discharge, and you may take your own course, and land your goods at Falmouth, and take your remedy," then there would have been a breach of the contract, except for what I am going to call attention to; and I do not think that the clause that lay-days may count after the forty-eight hours is an entire compensation for all the damage that might happen for want of such notice being given.

That being so, the question is whether, supposing that there is a contract, or that there would have been a contract but for this clause, there is anything to show that the liability is to cease. The meaning of the words as they stand alone is, that the liability shall cease as soon as the cargo is put on board, if it should turn out to be of a sufficient value; and what Mr. French, in what I concur in thinking was a very able argument, wants us to do is to insert after the words "the liability of the charterers shall cease," the words "as to all matters as to which a lien is given"—that is, freight, dead freight, and demurrage; but this is a thing that ought not to be done without almost a necessity for so doing, because the parties could have added those words if they had thought fit, and they have not done so.

Now is there such a necessity? What does Mr. French rely upon? First of all, he relies upon the argument that there are various other matters, which he says are not provided for; but I think that the Lord Justice has sufficiently dealt with those matters. Mr. French says there are certain authorities which show that the exemption from liability, or the freedom from liability, upon the cargo being loaded, extends only to those matters as to which the lien is given. I do not find that to be so; I do find that as to breaches antecedent to the loading of the cargo it has been so held, and, it seems to me, reasonably so held, on two grounds: first, that where a breach of a contract has been committed a right of action exists, and it cannot be that those words, "all liability is to cease," extend to relieve the charterer
254] *from the right of action as to those breaches. Secondly, there is a sort of technical reason that a cause of action once vested cannot be legally divested. Then, on the reason of the thing, Mr. French argues thus: "Does it not stand to reason that those words must be introduced, and this clause must be limited in that way, because otherwise you have that which, under other circumstances, would

be a contract prevented from being a contract, and you have that which is a contract left in a situation in which it may be broken and no remedy given." That is an ingenious argument, but we must look upon cases of this kind from a practical point of view, and it is perfectly intelligible that this very matter might have been discussed between the charterers and the shipowners. The shipowners might have said, "But what if no notice is given?" and the others might have said, "Take the charter upon those terms or leave it alone. We are not going to be troubled with quarrels on the other side of the water. If you do not think this makes you safe enough, do not enter into the charter." Is there anything so unreasonable in this supposition, that to guard against it we must insert words that are not there? It seems to me that there is not, especially when it is borne in mind that really and practically, as Mr. Mathew said, in ninety-nine cases out of a hundred, no question of this sort would arise. The clause says that if notice is not given in due time, the delay shall count as lay-days, and that is ample protection to the shipowner. Is it, then, reasonable to say that this was a risk which the shipowners were not willing to undertake? If it was present to the minds of the shipowners, there is no reason why the words should be inserted by us, because the only ground for inserting them is to suppose that the parties must have intended them. If they were not thinking of the risk, they did not intend the words to be inserted; and if they were thinking of it, they were perfectly satisfied with the provisions made for the shipowners. I think, therefore, that the judgment of the court below should be affirmed.

Judgment affirmed.

Solicitors for plaintiffs: *Vizard, Crowder & Co.*, for Yates, Son & Co., Liverpool.

Solicitors for defendants: *Hollams, Son & Coward.*

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[2 Common Pleas Division, 255.]

May 4, 1877.

[IN THE COURT OF APPEAL.]

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Local Board—Delegation of Powers to a Committee—Land Drainage Act, 1861 (24 & 25 Vict. c. 133), sched. Part II, clause 6.

Where a board constituted by an act of Parliament are authorized by it to delegate any of their powers to a committee, the powers so conferred upon the committee must be exercised by them acting in concert; and it is not competent to the committee to apportion amongst themselves the duties so delegated to them; and one of them acting alone, pursuant to such apportionment, cannot justify his acts under the act of Parliament.

CLAIM. 1. The plaintiff was possessed of two closes of land situate in that portion of Deeping St. Nicholas, in the county of Lincoln, known as the Counter Drain Washes, and bounded by lands of R. Everard towards the east, by the Counter Drain towards the south, and by lands of R. Parr's devisees towards the west, and of a ditch and of two gateways or passages forming the entrance from the road on the bank of the river Glen over the said ditch into the said respective closes, and of certain other lands near to the said ditch, all situate in the parish of Deeping St. Nicholas, in the county of Lincoln.

2. The water passing along the said ditch lawfully passed and was carried by means of culverts or tunnels under the said gateways or passages forming such entrance as aforesaid.

3. At divers times in July, 1875, the defendant wrongfully broke and entered the said closes and the said ditch and passages and gateways respectively, and broke down and dug up and destroyed the said passages and gateways, and the said culverts and tunnels under the same respectively, and dug holes in the said closes and passages and gateways respectively, and removed large quantities of earth and soil therefrom, and damaged and destroyed the same.

4. By means of the premises, large quantities of water were wrongfully caused and permitted to flow and did flow from off certain lands of the defendant and other lands through and along the said ditch into and upon the said closes and the said other lands of the plaintiff, and remained 256] thereon for a long time, and *damaged the crops and seeds of the plaintiff then growing thereon, and the plaintiff was deprived of means of access for himself and his cattle to and from the said closes and the said road, and lost the

use of the said closes and other lands, and was otherwise damnified.

The plaintiff claimed £220 damages and such further or other relief, by injunction or otherwise, as the nature of the case might require.

The defence, so far as is material, was as follows:—

5. The Counter Drain Washes is a drainage district duly constituted under the Land Drainage Act, 1861, and the Land Drainage Supplemental Act, 1873.

6. Before the happening of the alleged grievances, or any of them, the defendant had been duly appointed a member of the drainage board of the said district.

7. Such of the acts in the statement of claim complained of as were done by or under the authority of the defendant were so done by him in his capacity of member of the board, and under and by virtue of the authority of the board and of a committee thereof duly constituted, and were within the powers conferred upon the defendant as and being a member of such drainage board, and upon the said drainage board and the said committee thereof, by the Land Drainage Act, 1861, and the Land Drainage Supplemental Act, 1873, and the defendant has not done anything in excess of such powers, nor did he in doing the said acts cause to the plaintiff any unnecessary damage.

8. Immediately before the happening of the events in the statement of claim complained of a large quantity of rain had fallen, and a certain dyke called the Soak Dyke was full of water, and there was not sufficient outfall for the water therein: thereupon the defendant, as such member of the drainage board as aforesaid, and acting under the authority of the said board and of a committee thereof duly constituted, caused certain culverts or tunnels which had been previously constructed by the said drainage board in order to carry off the water from the said Soak Dyke, to be laid open in order to provide a better outfall for the water from the said Soak Dyke, and otherwise cleaned out and enlarged the said tunnels. Averment, that the acts *in [257 this paragraph mentioned were the alleged grievances in the statement of claim complained of, and that the said acts were done by the defendant in such capacity and under such authority as in the last-preceding paragraph mentioned, and were deemed by the defendant to be and were in fact reasonable and proper to be done in order to carry off the flood-water which had accumulated within the said drainage district. Issue thereon.

The cause was tried before Mellor, J., at the last Easter

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assizes at Lincoln. The district in which the plaintiff's land was situate was by a provisional order of the Inclosure Commissioners made on the 6th of February, 1873, in pursuance of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), constituted a separate drainage district by the name of The Deeping Fen Separate Drainage District; which provisional order was confirmed by the Land Drainage Supplemental Act, 1873, 36 Vict. c. xxiv. By that provisional order it was provided that the drainage board for the district should consist of nine members, of whom the defendant was one.

The first part of the Land Drainage Act, 1861, deals with the commissions of sewers and the powers and duties of the commissioners. The second part, commencing with s. 63, deals with the formation of drainage districts. Sect. 66 enacts that "the superintendence of matters relating to drainage within a drainage district shall be vested in a board thereafter called a drainage board, and such board shall be a body corporate," &c. Sect. 67 enacts that "all powers by this act or by any other act of Parliament, law, or custom, vested in or exercisable by commissioners of sewers within the limits of their jurisdiction, may, upon the constitution of a drainage district, be exercised by the drainage board of such district within its limits, and all powers hitherto exercisable by commissioners of sewers within such district shall cease," &c. And s. 70 enacts that, "subject to any provisions to the contrary that may be made by the provisional order constituting the district, the mode of electing members of drainage boards, and the proceedings of drainage boards, shall be conducted in manner directed by the schedule annexed hereto."

Part I of the schedule contains the rules as to the election of members of drainage boards; and Part II, the rules governing the proceedings of drainage boards. The first 258] clause of Part II of the *schedule provides that "a drainage board shall meet together for the dispatch of business, and shall from time to time make such regulations with respect to the summoning, notice, place, management, and adjournment of such meetings, and generally with respect to the transaction and management of business as they think fit, subject to the following condition,—that (a) No business shall be transacted at any meeting unless at least three members are present at the commencement and close of the business; (c) All questions shall be decided by a majority of votes of the members present; (d) The names of the members present, as well as of those voting upon each question, shall be recorded." Clause 6 provides, that "The

board may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers delegated, conform to any regulations that may be imposed on them by the board." Clause 8 provides that "a committee may meet and adjourn as they think proper. Questions at any meeting shall be determined by a majority of votes of the members present; and, in case of an equal division of votes, the chairman shall have a second or casting vote." And clause 9 provides that "The board shall cause minutes to be made, in books provided for that purpose: (1.) Of all the appointments of officers made by the board; (2.) Of the names of the members present at each meeting of the board and committees of the board; (3.) Of all orders made by the board and committees of the board; and (4.) Of all resolutions and proceedings of meetings of the board and of committees of the board. And any such minutes as aforesaid, if signed by any person purporting to be the chairman of any meeting of the board or committee of the board, shall be receivable in evidence without any further proof."

At a duly convened meeting of the Deeping Fen Drainage Board held on the 27th of April, 1875, the following resolution was passed: "Resolved that Mr. R. Ward, Mr. S. Andrews, and Mr. Charles Plowright be appointed a committee to act in any case of emergency, with all the powers conferred by the provisional order 15th May, 1873, on such committee."

The way in which the committee carried out that resolution was as follows: The Soak Dyke, a ditch or drain which received the *soakage and overflow of the river Glen, [259 and which passed in front of certain lands of the plaintiff and of several other persons, being four or five miles long, the three members of the committee named in the above resolution agreed among themselves that a portion should be allotted to each of them over which he was to watch, and, in case of emergency, to execute the power delegated to the committee by the board: and in the execution of the power so delegated to him by his co-committeemen the defendant, for the purpose of more conveniently letting off the water which had accumulated in the dyke from the excessive rainfall and the overflow of the river Glen, cut through the gateways leading to the plaintiff's closes, the tunnels or culverts thereunder being too small to allow the water to pass away with sufficient rapidity.

There was evidence to show that the course pursued by

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the defendant was a reasonable and proper one, and was necessary to preserve the adjoining lands (including the plaintiff's) from being inundated, and that it was approved by the other two members of the committee; but it was insisted on the part of the plaintiff that the mode of proceeding was unauthorized by the statute, inasmuch as it was not the act of the three acting jointly as a committee.

The learned judge left five questions to the jury,—1. Was the damage done to the plaintiff's land occasioned by the excessive rainfall combined with the soakage and overflow of the Glen and Counter Drain and the shutting of the staunch at the outfall of the tunnel? 2. Was any damage done to the plaintiff's land by the act of cutting the gateways which could be estimated as the result of that act? 3. Was the cutting of the gateways a reasonable and proper act under the circumstances, and was it done with ordinary and reasonable care? 4. Did the defendant act in the reasonable belief that he was doing that which was for the best under the provisions of the Land Drainage Act and the powers conferred on the committee? 5. Was the act of cutting the gateways authorized by the other two members of the committee?

The jury answered the second question in the negative, and all the others in the affirmative; whereupon the learned judge entered a verdict for the defendant. He, however, directed the jury to assess (contingently) the damages resulting to the plaintiff from *the cutting of the gateways. The jury assessed the damages at 1s. Leave was reserved to the plaintiff to move to enter a verdict and judgment for 1s., without costs, in the event of the court being of opinion that the act of Parliament afforded no justification to the defendant.

Jan. 11. *Graham*, for the plaintiff, moved accordingly: The plaintiff is entitled to a verdict and judgment for 1s. He cannot ask for more, inasmuch as the jury were unable to estimate the damage he had sustained. The whole scope of the Land Drainage Act, 1861, shows that the powers given to the local board and to the committee must be exercised by them acting in concert and at a meeting. The board may, it is true, by the 6th clause of the second schedule, delegate any of their powers to committees; but the committee must, in the exercise of the powers so delegated to them, conform to the regulations imposed on them by the act. Here, the resolution of the 27th of April, 1875, appointed the three persons named to act as a committee: they could only act in concert, and could not delegate any part of the authority conferred upon them to one of their number. The persons whose

lands were to be interfered with were entitled to have the judgment of the three, or of the majority of them, before they could legally do what they did. It was distinctly laid down by the Court of Exchequer, in *D'Arcy v. Tamar, Kit Hill and Callington Ry. Co.* (¹), that a committee having powers delegated to them as a body by a public board, must exercise those powers jointly. There the prescribed quorum of directors of a railway company being three, the secretary affixed the seal of the company to a bond, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third to sign the authority: the company being sued upon this bond, it was held that the seal was affixed without lawful authority, and that the company were therefore not liable on the bond. Martin, B., said: "It is not necessary that there should be any fixed place of meeting; but it is quite clear that the directors are to act together and in a meeting; whereas, the authority on which the secretary acted was given by two only *acting together, and by [26] the subsequent assent of the third. The authority, therefore, was not of such a character as enabled the secretary to affix the seal so as to bind the company." And Bramwell, B., said: "The seal was not properly affixed; for, this could not be done except by the authority of such a number of directors as had power to act for the company, acting jointly and as a board."

Mellor, Q.C., and *Fitzgerald*, showed cause: The committee were expressly appointed to act in case of an emergency. This was a case of emergency, and the jury have found that the work was proper to be done, and was done *bona fide*, and authorized by the other two members of the committee. The subdivision of the district to be overlooked was essential, by reason of its extent; and there was no time for the three to meet and consult.

[LORD COLERIDGE, C.J.: Might not the board, if they had thought fit, have delegated these powers to a committee consisting of one member only?]

No doubt.

LORD COLERIDGE, C.J.: I think the plaintiff is entitled to have judgment entered for him for 1s., without costs. I have come to this conclusion with reluctance, because I find that in this case the power which the defendant assumed to exercise was exercised *bona fide*, and, if not to the direct advantage of the plaintiff, at least not with any appreciable damage. The case raises a grave question upon an impor-

(¹) Law Rep.. 2 Ex., 158.

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tant act of Parliament. It may be convenient that such things as were done here should be done in cases of emergency: but the powers conferred by the act in question are very strong, practically superseding to a great extent the rights of private property, an interference with which is only permitted where it is for the general good; and in all cases the authority must be strictly followed. The question turns upon the true meaning of the 6th and 8th rules of the second schedule. The 6th provides that the "board may delegate any of their powers to committees consisting of such *member or members* of their body as they think fit. Any committee so formed shall, in the exercise of the powers delegated, conform to any regulations that may be imposed on them by the board." The 8th rule provides that "a committee 262] may meet *and adjourn as they think proper. Questions at any meeting shall be determined by a majority of votes of the members present; and, in case of an equal division of votes, the chairman shall have a second or casting vote." Now, what was done here was not done in strict conformity with those provisions. Under clause 6 of the schedule it may be that the board might have delegated this power to a single member of their body. They have, however, delegated it to three. The resolution is, "That Mr. Ward, Mr. Andrews, and Mr. Plowright be appointed a committee to act in any case of emergency, with all the powers conferred by the provisional order 15th May, 1873, on such committee." Now, neither the rules, the provisional order, nor the resolution appointing the committee confer upon them the power of acting otherwise than in concert. Being a plural body, they must conform to the regulations which govern all such bodies, and must act according to the provisions of the 8th clause, which manifestly contemplates the bringing together of the whole of the members of the committee in order that they may exercise a joint judgment in each case. Here is not even an informal assent of the three, as there was in *D'Arcy v. Tamar, Kit Hill and Callington Ry. Co.*(¹). The committee, it seems, met and agreed that the part of the drain in question should be dealt with exclusively by the defendant. That was, in effect, the committee assuming to clothe the defendant, a member of their body, with a power which the board alone could clothe him with. It was not competent to them to delegate powers, which required the united action of the three, to be exercised according to the unaided judgment of one of them. I come therefore to the conclusion that these powers should be carefully main-

(¹) Law Rep., 2 Ex., 158.

tained by the courts; that the authority given by the act has not been exercised either according to the letter or the spirit; and that judgment should be entered for the plaintiff for 1s. without costs.

LINDLEY, J.: I am of the same opinion. It is a well established rule, and one which is essential to the protection of the public, that powers conferred by Parliament shall be executed strictly in the manner which Parliament contemplated. The act is divided *into two parts. The [263 first part deals with the general scheme for district drainage, and the second part prescribes the mode in which it shall be carried out by means of local drainage boards. The powers of the local board are regulated by the schedule annexed to the act: and, when we look at what those powers are, we find that no authority is conferred on the local board to delegate their powers, except that which is conferred upon them by clause 6 of the second part of that schedule,—“The board may delegate any of their powers to committees consisting of such *member* or *members* of their body as they think fit.” That gives the extent of their power to delegate. I will assume that the board may delegate their powers to *one* of their body; but that could only be because the board in their collective capacity have confidence in his skill and ability. But here the difficulty is that they have not done so. They have delegated the power to do the work in question to a committee consisting of three individuals. Whatever is done by the persons so selected must be the joint act of the three; it was not competent to the committee to delegate any of their powers to one or two of their number. What was done here might be quite right and convenient if the act of Parliament had been followed; but the public are entitled to be protected against the chance of mischief by a departure from its directions. Sudden emergencies could always be provided for by pursuing the course suggested. I think the plaintiff is entitled to have the verdict entered for him in pursuance of the reservation of my Brother Mellor.

Mellor, Q.C., asked that the costs of the rule might be disallowed.

Graham, contra, submitted that, inasmuch as an important question had been reserved by the judge for the opinion of the court, there could be no reason why the ordinary rule should be departed from.

PER CURIAM: The defendant might have submitted to a verdict for 1s. Having caused the costs by resisting the rule, he must pay them. *Judgment for the plaintiff.*

The defendant appealed.

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264] *May 4. *Mellor*, Q.C., and *Buszard*, Q.C., for the defendant, contended that the cutting through the gateway was within the scope of the powers delegated by the board to the committee, and the committee had arranged amongst themselves in what manner they should act upon an emergency, therefore all three committee men acted in concert, and it was only the mere details and mode of acting which were delegated to the defendant.

Lawrence, Q.C., and *Graham*, for the plaintiff, were not heard.

JAMES, L.J.: I assent to the judgment of the Common Pleas Division. I agree with the reasoning of Lord Coleridge, C.J. It was not competent to the committee to delegate their powers to one of their number. If all three had agreed that it was necessary to cut the gateway, and two of them had told the third to cut it, then there might have been a justification for the act, but under the circumstances which have happened the defendant was not acting under proper authority.

BAGGALLAY and BRETT, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Wright, Bonner & Wright*, for Bonner & Calthrop, Spalding.

Solicitors for defendant: *Varley & Toynbee*, for Toynbee, Larkin & Toynbee, Lincoln.

Where by law a power is vested in or required to be performed in matters of *public* concern by two or more persons or officers, the act of a portion is not valid except upon a meeting of all those in whom the power is vested. All must meet and confer, and then a majority can decide and act: *Board, etc., v. Sackrider*, 35 N. Y., 154; *People v. Supervisors*, 11 N. Y., 563, 571; *Powell v. Tuttle*, 3 N. Y., 896; *Olmsted v. Elder*, 5 N. Y., 144; *Pell v. Ulmar*, 18 N. Y., 139, 21 Barb., 500; *White v. Lester*, 1 Keyes, 316, 4 Abbott's App. Dec., 585; *L'Amoureux v. O'Rourke*, 3 id., 15, 2 Keyes, 499; *Lee v. Parry*, 4 Denio, 125; *McCoy v. Curtice*, 9 Wend., 19; *Whitford v. Bissell*, 14 How. Pr., 302; *Horton v. Garrison*, 23 Barb., 176; *People v. Walker*, 23 Barb., 304; *Keeler v. Frost*, 22 Barb., 400; *Ex parte Rogers*, 7 Cow., 526; *Parrott v. Knickerbocker*, 38 How., 508; *Orr v. Ranney*, 12 U. C. Q. B., 377; *Thomas v. Clapp*, 20 Barb., 165; *Harris v. Whitney*, 6 How. Pr.,

175; *Beekman's Petition*, 19 Abb. Pr., 244, 1 Abb., N.S., 449, 31 How., 17; *Whiteside v. People*, 26 Wend., 635, reversing 23 Wend., 9; *Matter of Willcocks*, 7 Cow., 402, 409; *Field v. Field*, 9 Wend., 394, 403; *Paradise Road*, 29 Penn. St. Rep., 20; *Spicer v. Slade*, 9 Johns., 360; *Babcock v. Lamb*, 1 Cow., 238; *Woolsey v. Tompkins*, 23 Wend., 326; *Grindley v. Barker*, 1 Bos. & Puller, 229, 236; *Withnell v. Gartham*, 6 Term Rep., 388; *Atty-Gen. v. Davy*, 2 Atk., 212; *Blacket v. Blezard*, 9 B. & C., 851, 17 Eng. C. L.

See 2 N. Y. Revised Statutes, 555, § 27, 2 Edm. St., 575, as amended Laws 1874, ch. 321, p. 377, 9 Edm. St., 894; Laws 1858, p. 270, § 7.

See *People v. Rector, etc.*, 48 Barb., 606.

This is a rule of the common law. The object is to secure to the public the advice and judgment of all, the exposing of the mind of each, to that of all of those upon whom the law confers the

power to decide upon the propriety or necessity of acting for a *public* purpose: *Smith v. Helmer*, 7 Barb., 423-427; *Watson v. Duke, etc.*, 11 Ves., 160; *Ex parte Rogers*, 7 Cow., 530.

It applies to all *officers* having a joint authority: *Doughty v. Hope*, 3 Denio, 253; *Pell v. Ulmar*, 21 Barb., 500; *Powell v. Tuttle*, 3 N. Y., 400-1; *Woolsey v. Tompkins*, 23 Wend., 326; *Downing v. Ruger*, 21 Wend., 182; *Crooker v. Crane, Id.*, 218; *McInroy v. Benedict*, 11 Johns., 402; *Battye v. Gresley*, 8 East, 319; *Whitford v. Bissell*, 14 How., 302.

As to a judge of the Supreme Court who did not hear an argument, sitting to form a quorum to decide a case argued at a prior term, see *Corning v. Slosson*, 16 N. Y., 294; *Parrott v. Knickerbocker*, 38 How., 508.

See *Pistor v. Hatfield*, 46 N. Y., 1; *Real v. People*, 42 N. Y., 270; *Richter v. Poppenhausen*, 42 N. Y., 373.

By statute, in New York, all the arbitrators upon a written submission must *meet* together and *hear* the proofs and allegations of the parties. Two cannot do so after notice to a third. After all have heard the case a majority may decide, after consultation by all: *Bulson v. Lohnes*, 29 N. Y., 291; *Cruger v. Hudson Riv. R. R.*, 12 N. Y., 190; *Parrott v. Knickerbocker, etc.*, 38 How., 508.

So as to assessors to assess damages: *Beekman's Petition*, 19 Abbott, 244, 1 Abb., N.S., 449, 31 How. Pr., 17.

Otherwise as to referees: *Clark v. Fraser*, 1 How. Pr., 98.

It has been held that though one of several officers required to be present at the action of all be absent at their first meeting, yet if he afterwards attend and take part with others in all subsequent proceedings, the action of a majority is legal and valid: *Paradise Road*, 29 Penn. St. R., 20.

So where all the members of a city council are not notified of a meeting at which an act is done, or resolution adopted, if at the next regular meeting the minutes of the special meeting are read and approved, this will be equivalent to a ratification of what was done at that meeting. A municipal corporation may ratify all contracts not *ultra vires*: *Shawneetown v. Baker*, 85 Ills., 564.

Though a board of excise commissioners, or a majority of them, consisting of three persons, must authorize the commencement of a suit in their name, where one of the board has instituted proceedings, and the consent of the other members can be presumed, the proceedings will be sustained: *Board, etc., v. Sackrider*, 35 N. Y., 154; *Story v. Furman*, 25 N. Y., 228.

A warrant issued for the collection of taxes, under the village act of New York (Laws 1847, ch. 426, § 92), is imposed upon the trustees as a body, and the power may be exercised by the vote of a quorum at any regular meeting duly convened. It is not the act of the individual officers, and the warrant is valid without the signature of all: *Bank v. Brown*, 26 N. Y., 467.

All the members of a body are presumed to have notice of a general or stated meeting held pursuant to the by-laws of the body: *Gildersleeve v. Board, etc.*, 17 Abb., 201.

An authority to do acts merely ministerial or mechanical may be delegated, but not so where the act involves the exercise of judgment or discretion: *Powell v. Tuttle*, 3 N. Y., 396; *Board v. Sackrider*, 35 N. Y., 157; *Crocker v. Crane*, 21 Wend., 211; *Thomas v. Clapp*, 20 Barb., 165; *Clark v. Fraser*, 1 How. Pr., 98; *Vail v. Owen*, 19 Barb., 22; *Prosser v. Secor*, 5 Barb., 608; *Weaver v. Devendorf*, 3 Denio, 120; *Randall v. Smith*, 1 Denio, 219; *Easton v. Calendar*, 11 Wend., 93.

A municipal corporation in its ordinance requiring the leveling and paving of streets, must conform strictly to the provisions of the statute giving it power to pass such ordinance, or its proceedings will be void.

The common council of the city of Schenectady being authorized by statute to make by-laws and ordinances directing any street or lane in said city to be pitched, leveled, paved, flagged, etc., within such time *and in such manner as they might prescribe*, under the superintendence and direction of the city superintendent, made an ordinance requiring the owners or occupants of lots fronting on a certain part of State street, by the 20th day of June thereafter, to cause the street in front of their lots to be pitched, leveled, and paved to the centre of the said street,

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and the sidewalk to be pitched, leveled, and flagged, at their own expense, *in such manner as the city superintendent, under the direction of the committee on roads of the common council*, should direct and require. In an action against the owner of a lot, founded on such ordinance: Held, that the ordinance was void, because it did not prescribe the manner in which the street and sidewalks were to be pitched, leveled, paved, and flagged.

The common council were required by the statute to determine themselves the manner in which the improvement should be made, and could not delegate that power to any officer or committee of the corporation: *Thompson v. Scherhorn*, 6 N. Y., 92, affirming 9 Barb., 152; *Birdsall v. Clark*, 6 N. Y. Weekly Dig., 428, N. Y. Court Appeals; *Cowen v. West Troy*, 43 Barb., 51-2; *Richardson v. Heydenfelt*, 46 Cal., 68; *McMahon v. Supervisors*, 46 Cal., 214; *Matter of Notre Dame Street*, 12 Lower Canada Jur., 273.

See *Brooklyn v. Breslin*, 57 N. Y., 591.

A resolution passed by the board of supervisors of San Francisco declaring their intention to improve a street, need not contain a *complete* plan and specifications of the proposed improvement. The resolution of intention need not describe the work with any more exactness than is described in the law itself: *Harney v. Heller*, 47 Cal., 15.

When a *private* authority is conferred on several, all must be present and all must concur unless provision be otherwise made: *People v. Walker*, 23 Barb., 304; *Crocker v. Crane*, 21 Wend., 211; *Green v. Miller*, 6 Johns., 39;

Brown v. Andrew, 13 Jur., 938, 18 L. J. Rep., Q. B., 153; 7 N. Y. Leg. Obs., 197; *Peay v. Schenck*, 1 Woolworth's C. C. Rep., 177, 187-8; *Parrott v. Knickerbocker Ice Co.*, 38 How. Pr., 509.

Where, however, only one of several executors qualifies, he, unless otherwise provided by the will, takes all the powers which all would have taken had they qualified: *Leggett v. Hunter*, 19 N. Y., 446.

If one of several public officers be dead, or his office is vacant, the remainder may act: *Downing v. Rugar*, 21 Wend., 178; *Gildersleeve v. Board*, etc., 17 Abb., 201; *People v. Palmer*, 52 N. Y., 83; *People v. Mayor*, 63 N. Y., 291.

See, however, *Harding v. Head*, 35 Barb., 35; *Beekman's Petition*, 19 Abb. Prac., 244, 1 Abb., N.S., 449, 31 How. Pr., 17; *People v. Nostrand*, 46 N. Y., 375.

It will be presumed, in the absence of evidence to the contrary, that all met and deliberated, unless the statute requires a statement in the record that all met. If that be required, parol evidence of the fact is inadmissible: *Stewart v. Waller*, 30 Barb., 344, 347; *People v. Williams*, 36 N. Y., 441; *People v. Hynds*, 30 N. Y., 470, 27 Barb., 94; *Marble v. Whitney*, 28 N. Y., 297; *Downing v. Rugar*, 21 Wend., 178; *Thomas v. Clapp*, 20 Barb., 165; *Sargent v. Webster*, 13 Met., 497, 504.

A notice signed by the president of a board, with nothing on its face to show it emanated from the board, will not require the individual upon whom it is served to presume it emanated from the board: *Board, etc., v. Vanderbilt*, 2 Rob., 367, 380.

C A S E S

DETERMINED BY THE

EXCHEQUER DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE EXCHEQUER DIVISION,

X L V I C T O R I A .

[2 Exchequer Division, 253.]

Feb. 9, 1877.

[IN THE COURT OF APPEAL.]

*COHEN V. THE SOUTH EASTERN RAILWAY [253]
COMPANY (').

Railway Company—Carriers by Steamer—Passenger's Luggage—Conditions as to Non-liability—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7—Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 16—Contract in one country to be performed in another, governed by which Law.

Luggage carried for a passenger without extra charge is within s. 7 of the Railway and Canal Traffic Act, 1854, which enacts that a railway company "shall be liable for the loss of or injury to any horse, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect of such company or its servants, notwithstanding any notice or condition made and given by such company in anywise limiting such liability;" and the provisions of that section are extended, by s. 16 of the Regulation of Railways Act, 1868, to the traffic on board steamers belonging to or used by railway companies authorized to have and use them.

Plaintiff was an English subject, and defendants were an English railway company subject to the English statutes as to railways, and authorized to have and work steamers between Boulogne and Folkestone. Plaintiff took a ticket at an office of the defendants in Boulogne, for a through journey from Boulogne to London, by defendants' steamer to Folkestone, and thence by their railway to London. On the ticket was: "Each passenger is allowed 120 lbs. of luggage free of charge." "The company is in no case responsible for luggage of the passenger travelling by this through

(¹) S. C. on demurrer, 1 Exch. Div., 217.

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ticket of greater value than £8." Plaintiff had a box with her, which was given in charge of defendants' servants, and in transferring it from the boat to the train it fell into the sea, owing to the negligence of defendants' servants, and the contents were damaged to the amount of £73:

Held, affirming the judgment of the Exchequer Division, that, assuming the contract to be governed by English law, the condition on the ticket was void by reason of the above sections, and defendants were liable for the loss.

Quære, whether the contract was governed by English or French law, or partly by one and partly by the other.

Stewart v. London and North Western Ry. Co. (3 H. & C., 135) overruled.

SPECIAL CASE stated in an action for damage to the personal luggage of the plaintiff's wife, while being carried by the defendants as a passenger from Boulogne to London.

Plaintiff is a British subject domiciled in England.

Defendants are a railway company incorporated by acts of Parliament; by virtue of which they work a railway from Folkestone to London; and they are authorized by other acts to build, buy, or hire, and use and work steam vessels between Boulogne in *France, and Folkestone, and by virtue of those acts they own certain vessels, and are carriers by them of passengers and their luggage and other goods between the above ports.

In April, 1875, plaintiff's wife being about to return from a visit in France, her son, Mr. S. Cohen, who had been resident and carrying on business at Boulogne for rather more than a year, obtained for her, at her request, at the defendants' office in Boulogne, and paid for a first-class ticket from Boulogne to London. On the ticket was printed the following:—

"Each passenger (1st class) is allowed to take 120 lbs. of luggage free of charge.

"The South Eastern Railway Company is not responsible for loss, or detention of, or injury to, luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the South Eastern Railway Company's trains or boats, and in this latter case only when the passenger complies with the by-laws and regulations of the company, and in no case for luggage of greater value than £6."

Defendants do not offer passengers any alternative terms, other than the above, upon which their luggage may accompany them, and be carried in the same boat and train as themselves.

Amongst Mrs. Cohen's luggage was a box, which was given in charge to a servant of defendants to register it for London, which was accordingly done, and it was placed with the rest of the passengers' luggage on board the steam-

boat; and a registration ticket for it was given to Mr. S. Cohen.

On the arrival of the vessel at Folkestone, the box, while being transferred from boat to train, fell into the sea, owing to the negligence of defendants' servants, and the contents were damaged by sea water to the amount of £73.

The above statement of facts was submitted to a French advocate to act as arbitrator as to the French law, and he found: "That, according to the French law, and under the circumstances, the company is responsible for the injuries which have happened by their neglect and default to the plaintiff's box. The conditions of non-liability printed on their ticket delivered cannot in any way relieve the company from the responsibility resting upon them."

*The question for the court was whether the plain- [255
tiff was entitled to recover.

The Exchequer Division having already given judgment for the plaintiff on demurrers raising the same points⁽¹⁾, formal judgment was given in this case also for the plaintiff.

The defendants appealed.

Jan. 22, Feb. 9. *Willis* and *Bremner* for the defendants. [They argued, first, that the contract was governed by English law; on this point they cited *Peninsular, &c., Co. v. Shand* ⁽²⁾; *Lloyd v. Guibert* ⁽³⁾; *Robinson v. Bland* ⁽⁴⁾.] Secondly, assuming the contract to be governed by English law, the defendants are not liable. In the first place, it must not be assumed that, as regards passengers' luggage, the defendants are common carriers; but if they were, this condition on the ticket would be a contract, and not a mere notice within the Carriers Act, 1 Wm. 4, c. 68: see *Van Toll v. South Eastern Ry. Co.* ⁽⁵⁾, where it was held that the delivery of a ticket with a condition bound the person taking it. In *Talley v. Great Western Ry. Co.* ⁽⁶⁾ it was treated by Willes, J., in a considered judgment of the court, as a moot point "whether the liability in respect of passengers' luggage is as stringent as that in respect of the ordinary carriage of goods, and whether there be any larger obligation in respect of goods carried with passengers than in respect of the passengers themselves to whom they are accessory;" and the cases *pro* and *contra* are collected. It is to be observed that nothing was paid in respect of the plaintiff's luggage; and Lord Holt decided in two cases—

⁽¹⁾ 1 Ex. D., 217, 223.

⁽²⁾ 3 Moo. P. C. (N.S.), 272.

⁽³⁾ Law Rep., 1 Q. B., 115.

⁽⁴⁾ 2 Bur., 1077.

⁽⁵⁾ 12 C. B. (N.S.), 75; 31 L. J. (C.P.), 241.

⁽⁶⁾ Law Rep., 6 C. P., 44, 50-51.

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Middleton v. Fowler ⁽¹⁾, and *Upshare v. Aidee* ⁽²⁾—that the owner of a stage carriage was not responsible for luggage carried for a passenger gratuitously, though it might be otherwise if the luggage were paid for.

[MELLISH, L.J.: Is not the sum paid as the fare of the passenger paid partly for the luggage he is allowed to carry with him?]

256] *There can be no liability, except upon a separate payment. If the company were liable as common carriers, then this anomaly would follow, that if a passenger were killed and his luggage burnt by an accident, occurring without any want of care on the part of the company, the executors could maintain an action for the loss of the luggage, but not for the death. But, assuming the defendants to be *prima facie* under some liability, it is said on behalf of the plaintiff, and it was so decided on the demurrers in the Court of Exchequer, that the condition on the ticket does not protect the defendants, but is void by the joint effect of s. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and s. 16 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119) ⁽³⁾. First, s. 7 does not extend to passengers' luggage. By s. 1 "traffic" includes passengers and their luggage; but s. 7 does not contain the word "traffic," and there is no definition of "goods." Passengers' luggage is not received, forwarded, and delivered in the same way as goods or cattle are, and it was not intended to include such incongruous things in one enactment. Moreover, passengers' luggage was not within the mischief intended to be remedied by the enactment, which was caused by such cases as *Carr v. Lancashire and Yorkshire Ry. Co.* ⁽⁴⁾ and *Austin v. Manchester, &c., Ry. Co.* ⁽⁵⁾. *Zunz v. South Eastern Ry. Co.* ⁽⁶⁾ and *Macrow v. Great Western Ry. Co.* ⁽⁷⁾ were cited for the plaintiff in the court below, but they neither of them decide that passengers' luggage is within s. 7. On the other hand, *Stewart v. London and North Western Ry. Co.* ⁽⁸⁾ is a direct authority for the defendants that it is not within the section; for that case is really not distinguishable from the present; the fact that a passenger took a ticket by an excursion train, by which he was allowed to take a smaller amount of luggage with him free of extra charge than by an ordinary train, cannot make any difference in principle. Secondly, s. 16 of 31 and 32

⁽¹⁾ 1 Salk., 282.

⁽²⁾ Com. Rep., 25.

⁽³⁾ The sections are set out, 1 Ex. D., 218, n.

⁽⁴⁾ 7 Ex., 707; 21 L. J. (Ex.), 261.

⁽⁵⁾ 10 C. B., 454; 21 L. J. (C.P.), 179.

⁽⁶⁾ Law Rep., 4 Q. B., 539.

⁽⁷⁾ Law Rep., 6 Q. B., 612.

⁽⁸⁾ 3 H. & C., 135; 33 L. J. (Ex.), 199.

Vict. c. 119, does not incorporate the whole of the previous act, but only the first six sections, viz., those sections which apply to the equality of charges, &c. The *first part [257 of s. 16 shows this. The Irish case of *Moore v. Midland Ry. Co.* ⁽¹⁾ was cited as an authority on this point for the plaintiff, but that case has been since overruled by *Doolan v. Midland Ry. Co.* ⁽²⁾, and the latter case is a distinct and deliberate decision that s. 16 does not incorporate s. 7 of the former act, so as to make the provisions of s. 7 applicable to a contract for the conveyance of goods by steamer.

Bray, for the plaintiff, was not called upon.

MELLISH, L.J.: I am of opinion that the judgment of the Exchequer Division ought to be affirmed.

The plaintiff's wife was a passenger who took a ticket at Boulogne, that is, her son went and got a ticket for her, to travel from Boulogne to London, *via* Folkestone, by the South Eastern Company's steamer from Boulogne to Folkestone, and by their railway from Folkestone to London. There was a provision on the ticket which excluded the liability of the company for the loss of passengers' luggage, if the value of the luggage exceeded a certain sum. This lady's box, by the carelessness of the company's servants, was dropped into Folkestone harbor and the contents were greatly damaged. It was as clear a case of loss by carelessness as a case could be, and the question is, whether the company is liable.

The first question that arose was, by what law the case was to be governed. It was found by a French advocate,—and there is not the least doubt that the French law is so,—that by the law of France a carrier cannot protect himself from the consequences of his own negligence by putting on his ticket anything of that kind. Therefore, if the contract is to be governed by the law of France, the plaintiff is entitled to succeed. But it was argued by the defendants' counsel that it is not governed by the law of France. We have not heard the argument on the other side, and therefore it would not be right that we should express any very confident opinion upon that point; and in fact it is not necessary to express any opinion whether the case is governed by the law of France or England. I confess for my own part that, the contract being made by an English passenger with an English railway *company regulated by English law, [258 I should have supposed that it ought to be governed by the law of England, and be taken as made with regard to the law of England. And the more so for this reason, that Par-

⁽¹⁾ Ir. Rep., 8 C. L., 232.

⁽²⁾ Ir. Rep., 10 C. L., 47, 82.

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liament having passed acts to regulate the traffic by both railways and steamboats, when the steamboats belong to the railway company, and there being certain clauses in those acts for the protection of passengers, I should not be willing to think that the railway company could escape from the stringency of those acts by having a booking-office in a foreign country, the object being to carry a variety of traffic which was intended to be regulated by Parliament by sea and by land.

The question, however, that we propose to decide is not whether the law of England or France regulates the contract, but whether the Railway and Canal Traffic Acts extend to this particular case; and I will assume in favor of the defendants that English law does apply generally to such a contract. Then the first question is, whether s. 7 of the Railway and Canal Traffic Act applies to passengers' luggage. On the first occasion we heard a very elaborate argument to show that it did not apply to passengers' luggage; and it was said that the contract for a passenger's luggage was not a contract for the carriage of goods by a common carrier. In the cases cited⁽¹⁾ that very learned judge, Lord Holt, seems to have thought that a coachman who carried some luggage for a passenger by the coach, was a mere gratuitous bailee, and not only was not liable as a carrier, but was not liable to take that degree of care which a bailee for hire would have to take. It was said, and I think, very possibly, said correctly, that that might probably be explained by the modes of carriage which existed at the time of Lord Holt, with which we are very imperfectly acquainted. But I cannot doubt the least, when a railway passenger or steamboat passenger pays a certain sum to the company for the carriage of himself and his luggage, that his luggage is carried for reward just as much as if he sent his goods by a goods train. You cannot settle the precise sum paid respectively for the carriage of the passenger and for the carriage of the luggage. But as the passenger was entitled for the fare he paid to carry a certain amount of luggage, *it seems to me absurd to say that the company are gratuitous bailees; and if they are not gratuitous bailees, it necessarily follows that they must be liable for the loss by carelessness. Whether they are common carriers subject to the liabilities in respect of carrying passenger traffic, I do not think it necessary to determine; but upon the authorities cited to us upon the first occasion, it seems to me that they are subject to the liabilities of common carriers

⁽¹⁾ See *Middleton v. Fowler* (1 Salk., 282), and *Upshare v. Aidee* (Com. Rep., 25).

for the loss of passengers' luggage; but, at any rate, whether they are liable as common carriers or not, they are liable for the loss of passengers' luggage caused by their own or their servants' negligence.

Then the question is this: does s. 7 of the Railway and Canal Traffic Act apply? It is this: "Every such company shall be liable for the loss of or for injury done to any horses, cattle or other animals, or to any articles, goods, or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability." It seems to me that passengers' luggage comes within the plain words of that section. It is said that passengers' luggage is not "articles, goods, or things;" but it seems to me passengers' luggage must be articles, goods, or things, and come within those plain words; and it is not because in other sections of the act, or, possibly, in some other act, the Legislature may have used the word "luggage" when they intended to speak of the luggage of a passenger, that it can be said that the words "articles, goods, or things" are not sufficient in their generality to include passengers' luggage. They are clearly sufficient. Then is not passengers' luggage "articles, goods, or things received, forwarded, or delivered" by the company or its servants? The passenger delivers his luggage to the company's servants, and therefore they receive it; and they carry it to the place where the passenger wishes to arrive, and when he arrives at his destination the luggage is delivered to him again. Therefore they do for reward enter into a contract to receive, and forward, and deliver that luggage; and it seems to me that it comes within the plain words. And it not only comes within the words, but it comes within the mischief which the act *contemplated; because, [260 it is obvious that if the company choose to insert at the back of their ticket some regulation that they will not be answerable for the loss of passengers' luggage by themselves or their agents, it comes within the mischief which the act contemplated. The passenger has no remedy, unless he gives up his journey altogether; he has no choice. Therefore it comes within the mischief, and the act says the company shall not put unreasonable conditions of that kind upon persons who have no power to resist. Therefore it comes directly within the words, and directly within the mischief; and s. 7 ought to be construed to include passengers' luggage.

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Then the next question is, whether 31 & 32 Vict. c. 119, s. 16, includes that provision of the Railway and Canal Traffic Act so as to apply it not only to the carriage by railway, but to carriage by steamer. It seems to me that this is a still plainer question, except for the doubt thrown upon it by the Irish case⁽¹⁾. But the words are so clear that there can be no doubt about it: "The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels and to the traffic carried on thereby." Those words in their plain and natural meaning incorporate s. 7, as well as every other section of the act. Then why should it be excepted? The only reason is that this clause is not contained in a separate section by itself, but is contained at the end of s. 16; and therefore it is said that it is to be confined to the subject-matter to which the previous parts of s. 16 relate. I am not aware that there is any such rule of construction of an act of Parliament. If some absurdity or inconvenience followed from holding it to apply to the whole act, it might be reasonable to confine the incorporation to clauses relating to some particular subject-matter; but if there is no inconvenience from holding that the incorporation includes s. 7 as well as the other sections, we ought to hold that it does. For my own part, so far from thinking there is any inconvenience, I think the direct contrary; because, inasmuch as the passenger takes one ticket, and the company enters into one bargain for the carriage both by railway and by steamboat, it would be most inconvenient that the company should be at liberty to put 261] conditions *of this kind *quà* the steamboat, and not be able to put conditions *quà* the railway. The consequence would be that, if a passenger started and delivered his luggage to the railway company, and then arrived at the end of the journey and the luggage was not forthcoming, and nobody knew where it was lost, he would not be able to recover, because he could not prove whether it was lost during the railway passage or whether it was lost during the sea passage. Nothing can be more convenient, as it appears to me, than that the section should apply to both.

Then, it may be observed, the Legislature foresaw that injustice might be done to the company in respect of carriage by sea; they are liable to accidents and losses by the dangers of the sea to which they are not liable by land, and if they were subject to a carrier's liability for loss of luggage, which we assume they would be, it would be hard upon them; therefore the Legislature has expressly provided for

(¹) *Doolan v. Midland Ry. Co.* (Ir. Rep., 10 C. L., 47).

that by another clause; they can, by putting up a notice in the office, save and protect themselves against those extraordinary liabilities against which parties protect themselves by the ordinary bill of lading, that is, against losses by the dangers of the sea, &c. ⁽¹⁾. Therefore they can protect themselves from losses by the dangers of the seas; but having so treated the liability by sea, the Legislature says that they shall not be subject to the same rule when they carry by railway, and they cannot put unreasonable conditions upon a passenger which shall prevent the passenger recovering for the loss of his luggage.

In my opinion, therefore, assuming in favor of the defendants that this case is to be decided according to the law of England, the judgment of the court below is perfectly right and ought to be affirmed.

BAGGALLAY, J.A.: If this contract is to be construed according to the law of France it is admitted that the plaintiff is entitled to recover from the defendants in respect of the subject-matter of the action. As to whether it should be construed according to the law of France or England I desire not to express any decided opinion, though it appears to me, as at present advised, that there is much to be said in favor of it being construed according to the law of France. *This case has been argued upon the assumption that [262 it is to be construed according to the law of England, and I entirely assent to the observations of the Lord Justice in that view of the case. I agree in the conclusion at which he has arrived as to the liability of the company in respect of the subject-matter of the action, and I assent entirely to the observations he has made, and the reasons assigned. I do not think it necessary in that view of the case to add anything to what he has said.

BRETT, J.A.: If we had thought ourselves bound to hold that there was a difference between the English law and the French law, I foresaw some considerable difficulty in determining whether such a contract was a French or an English one; not so much in this case as in cases which it is obvious must arise every day. In this case the ticket is taken at Boulonge, and all that has to be done is to be performed on an English steamer and on an English railway. But in cases which occur every day, the ticket is taken in Paris, and the first part of the journey is performed on a French railway; the ticket is taken in Paris at an office, as everybody knows, held by the South Eastern Company, and on the head of the ticket, like this we have now before

⁽¹⁾ Sect. 14 of 31 & 32 Vict. c. 119.

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us, is South Eastern Railway Company; therefore, the first part of the journey is performed under a contract made between the South Eastern Company in Paris and an Englishman; but the first part of the journey is to be carried out and performed on a French railway, and the two following parts on an English steamer and on an English railway respectively; and unless you could say that the three were entirely separate contracts, we should be called upon to say what law was to govern the first part of the journey, and whether that first part of the journey was to be ruled by the French law, and the other two by the English law. I, therefore, should find considerable difficulty in saying whether the contract as to the first part of the journey was to be considered as a French contract or an English one. However, it seems immaterial to consider that question, inasmuch as we are about to hold that the law of England and France as to the matter now before us is precisely the same. If you take the contract to be a French one as a whole, then it seems obvious that the *company could not do what they have tried to do by this ticket. I am inclined to think that the contract is an English one; but whether that part of it which has to be performed in France must, in strictness, be said to be performed according to French law, I know not. At all events, I should say that this particular contract is an English contract to be performed according to the English law.

If that is so, then comes the question whether, first of all, the case is within s. 7 of the Railway and Canal Traffic Act. To say that a passenger's luggage is in any sense part of a passenger himself, seems to be absurd, and to say that a passenger's luggage is not "articles, goods, or things," seems to be equally absurd. To say that a company do not receive a passenger's luggage in a different way from that in which they receive the passenger himself, seems to me to shut one's eyes to what goes on before one's eyes every day. If you go to Charing Cross Station you know very well that you yourself will be put in one part of the train, and you will not be allowed to take your luggage with you. If you proposed to take your luggage with you, they would tell you you shall not. They take your luggage from you, and they give you not only a ticket to represent yourself but a ticket with a different number to represent your luggage; they take your luggage away if you book it through, and they tell you you are not to have it until you get to the other end, and you shall not have it then unless you can show the ticket with the number on it they have given to

you. Therefore, they do receive the passenger's luggage; they undertake to deliver it at the other end, and they carry it in the meanwhile. It is an article or a thing of which they have taken charge, which they undertake to carry, and for the carriage of which they make you pay. Therefore, it seems to me impossible to say that it is not within the very words of this s. 7.

Then, if it is within the words of s. 7 whilst on the railway, comes the question whether it is not to be under the same rule whilst it is on board the steamer. I entirely agree with the Lord Justice that it is not possible to say that those words of s. 16 of the other act do not incorporate the whole of this s. 7, and make it applicable to the carriage on board the steamer.

*Against this decision there are two cases, and one [264 is a case in the Irish Court of Exchequer Chamber: *Doolan v. Midland Ry. Co.* (¹). I do not recollect exactly how far that case decided the present point. If it is a decision contrary to our present judgment, then I can only say with deference I do not agree with it. We are bound here to act upon our own view, and we must act here in the way I have explained. Then there is another case of *Stewart v. London and North Western Ry. Co.* (²) in England, which is said to be a direct authority in favor of the defendants. That was the case of an excursion train, and Baron Bramwell, in the court below, feeling that he must not overrule a case in a court of co-ordinate jurisdiction, went through the other process, which is never very difficult to an ingenious mind, that is, where you do not like a case and must not overrule it, you distinguish it. That process he performed with his usual skill. But, sitting here, I do not think one is bound to undertake that task. I think one may fairly say at once that one does not agree with *Stewart v. London and North Western Ry. Co.* (²). I cannot see any difference between that case and this, although in that case it was an excursion train. If a railway company choose to take a man's luggage away from him and take it in charge themselves, it seems to me it is no less an article or thing carried by the railway because the train is an excursion train. I, therefore, with great deference, do not agree with that case, and think it ought to be overruled.

Judgment affirmed.

Solicitor for plaintiff: *H. J. Coburn.*

Solicitor for defendants: *W. R. Stevens.*

(¹) Ir. Rep., 10 C. L., 47.

(²) 3 H. & C., 135; 33 L. J. (Ex.), 199.

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[2 Exchequer Division, 268.]

Feb. 6, 1877.

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Rogue and Vagabond—Spiritualism—Palmistry or Otherwise—5 Geo. 4, c. 83, s. 4.

The appellant was convicted by justices under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond "every person . . . using any subtle craft, means, or device *by palmistry or otherwise* to deceive and impose on any of His Majesty's subjects." In a case stated for this court, the justices found as a fact that the appellant attempted to deceive and impose upon certain persons by falsely pretending to have the supernatural faculty of obtaining from invisible agents and the spirits of the dead answers, messages, and manifestations of power, namely, noises, raps, and the winding up of a musical box:

Held, that the means used by the appellant came within the words "by palmistry or otherwise," and that the conviction was right.

CASE stated by justices under 20 & 21 Vict. c. 43.

1. At a petty sessions for the borough of Huddersfield, in the county of York, on the 11th of November, 1876, Francis Ward Monck, the appellant, was charged by the respondent, under s. 4 of 5 Geo. 4, c. 83, with having, on the 23d of October, 1876, at Huddersfield, unlawfully used certain subtle craft, means, and devices, by palmistry and otherwise, to deceive and impose on certain of Her Majesty's subjects, to wit, Hepplestone, Bedford, Lodge, and others, contrary to the statute. The charge was heard, and the appellant was convicted of the said offence and adjudged, as a rogue and vagabond, to be committed to the House of Correction at Wakefield to hard labor for three calendar months.

2. Upon the hearing it was proved, on the part of the respondent, and found as a fact that the appellant had agreed 269] with one *Hepplestone at the request of the latter, to give two spiritualistic séances at Hepplestone's residence, in Huddersfield, for two pounds each; that, in pursuance of this agreement, the appellant held two séances at Hepplestone's residence on the 22d and 23d of October, 1876. At the latter of such séances, in respect of which no money was paid, Hepplestone, Lodge, and others were present, and were directed by the appellant to place their hands upon the table around which they were seated, and their feet under their chairs, after which he said, "We spiritualists have to be very guarded in consequence of the Slade case. Some call it psychic force, some animal magnetism, some legerdemain, some conjuring, some one thing, and some another. I call it spiritualism; but you must judge for yourselves." There was no light in the room except that given by a single

gas jet, and, during what were termed the "manifestations" the gas was turned almost out. The alleged "manifestations" were the following:—

(a.) Raps were heard under the table, whereupon the appellant said, "They are soon here to night, the conditions are very favorable."

(b.) The appellant placed a small tamborine upon a musical instrument called "Fairy Bells," and then put it on the table at a little distance from himself. The instrument was then observed to move towards the appellant, who inquired whether the company had seen it move, whereupon one of them asked him to request the spirit to move it in the opposite direction, to which the appellant replied, "We had better take the manifestations exactly as they come," and that it could not be done. He was asked "Why?" and he answered, "I don't know how it is done."

(c.) A small musical box was handed round to the company, who examined it. It was then placed by the appellant about half a yard in front of himself on the table. He said the spirits were able to play it. He then placed a wooden box over it, and invited the company to ask it questions, and said that one sound would signify "No," and three sounds "Yes." Some questions were asked and certain sounds were heard, but these sounds occasionally were as many as five or six at a time. One of the company directed the appellant's attention to the fact that the musical box, which had been placed under the wooden box, was not wound up, *whereupon the appellant said that the [270] spirits could not only play, but wind it up.

(d.) A hand appeared above the table immediately on the left side of the appellant, who put the tamborine to it, and the fingers of the hand tapped it. The fingers did not move separately. The hand was not like a human hand, but like a wax hand which had been rubbed with oil and phosphorus. After a short time the hand disappeared before the table. One of the witnesses was of opinion that the hand was like one of the kid-glove hands found in the appellant's possession.

(e.) Two or three slates were placed by the appellant upon the table. He said they would receive messages from departed spirits. A small piece of pencil was placed by him upon one of the slates. He took hold of one corner of the slate, and a lady took hold of another corner of it. It was then held under the table, and whilst it was there the lady remarked that she felt a great pressure upon it. One of the company asked for a message from some departed one.

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After the slate had been held under the table about a couple of minutes, it was brought forth and was found to contain, in very crabbed, singular writing, the words, "Oh! for a Lodge in some vast wilderness." Another message was then asked for, and the appellant and the same lady again held the slate under the table. The lady remarked that she felt a warm hand, whereupon the appellant said, "Well, you're sure it's not my hand?" She replied, "No, I am not." When the slate was again produced there was a button upon it, and the following message, "Good night, Philemon. Saml.," the appellant having previously stated that his spirit-guide was Samuel Wheeler. It was proved that a scratching on the slate was heard at the same time that the lady felt a warm hand against her own. The button above mentioned was taken off the lady's dress; she stated that it was pulled from her dress rather violently.

(f.) One of the notes of the piano which was in the room sounded. A lady was then asked by the appellant to sit on the lid of the piano. She did so, and the same note sounded. It was proved that the appellant was close to the piano at the time. Lodge then asked the appellant if the spirit would play some other note. The appellant stamped; 271] whereupon Lodge asked, "That's you, *doctor, isn't it?" And he said, "Yes." Lodge then asked, "Will you kindly play a note lower?" Then came another stamp with the appellant's foot, which signified "No."

3. Whilst these manifestations were being produced there were two boxes in the room belonging to the appellant. When the manifestations were concluded Lodge asked to be allowed to search the appellant, who declined, and eventually ran away and escaped out of the house. He left certain boxes, which were subsequently examined, and in them were found, amongst other things, kid-glove hands, stuffed and having elastic attached to them, linen with faces faintly sketched upon it, white gauze, thread, thin wire, a number of slates and pencils, a musical box, a musical album, and a long rod divisible into small lengths.

4. It was proved, on behalf of the appellant, that he had had rooms at a certain house in Bristol for the last four years; that articles similar to some of those found in his possession had been openly used by him in his public lectures, showing how conjurers produced manifestations similar to those of spiritualism. It was contended on the part of the appellant that the Vagrant Act was intended to apply to gipsies and other wandering and homeless vagabonds, and that this was no offence within the meaning of s. 4 of 5

Geo. 4, c. 83, and the case of *Johnson v. Fenner* ⁽¹⁾ was cited in support of this view.

The justices, however, being of opinion that the evidence brought the case within the operation of s. 4, gave their determination against the appellant.

The question of law arising on the above statement for the opinion of the court, therefore, is, whether the justices were correct in their view of the law that the appellant was a rogue and vagabond within the meaning of s. 4 of 5 Geo. 4, c. 83, he having, in their opinion, upon the evidence before them, attempted to deceive and impose upon Her Majesty's subjects by using subtle craft, means, and devices.

If the court should be of opinion that the conviction was legally and properly made, and the appellant is liable as aforesaid, then the conviction is to stand; otherwise the conviction is to be quashed.

*Jan. 29. *H. Matthews*, Q.C. (*Lockwood* with him), [272 for the appellant: The justices have found, as a fact, that the appellant attempted to deceive by using subtle craft, &c., omitting the all-important words "by palmistry or otherwise." The appellant waives any technical objection, and only desires to raise the question whether the case as stated, and the facts as found, will properly support a conviction under 5 Geo. 4, c. 83, s. 4 ⁽²⁾. The appellant's performances were not "palmistry" which, as defined by Cowel's Law Dictionary, is "a kind of divination practised by looking upon the lines and marks of the fingers and hands. This was practised by the Egyptians mentioned in the statute (1 Ph. & M., c. 4), and there misprinted *palmistry*." Other dictionaries give similar definitions. The words "or otherwise" must mean "or other acts of the same kind as palmistry," according to the well-known rule of construction that "where a particular class of persons or things is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class": Broom's Leg. Max., 5th ed., p. 651, and the cases there cited.

⁽¹⁾ 33 J. P., 740.

⁽²⁾ By that section, "Every person . . . pretending or professing to tell fortunes or using any subtle craft, means, or device by palmistry or otherwise to deceive and impose on any of His Majesty's subjects . . . shall be deemed a rogue and a vagabond within the true intent and meaning of this act; and it

shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labor for any time not exceeding three calendar months. . . ."

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[POLLOCK, B., referred to *Watson v. Martin* ⁽¹⁾, where it was held that persons tossing halfpence and betting on "heads" or "tails," were not playing or betting . . . "at or with any table or instrument of gaming, at any game, or pretended game of chance," within 5 Geo. 4, c. 83, s. 4.]

The words "or otherwise" would include such arts as physiognomy, chiromancy, and perhaps, rhabdomancy, i.e., divination by a rod or wand: see Sir T. Brown's *Pseudodoxia Epidemica*, or *Vulgar Errors*, bk. 5, ch. 23, p. 316 (ed. 1672). The question is concluded by the only authority on the present words, viz., *Johnson v. Fenner* ⁽²⁾, where a man exhibited bags containing what were apparently silver half-crowns, and sold them for 1s. each, the bags really holding only halfpence, and it was held by Cockburn, C.J., Mellor and Hannen, JJ., that this case was not within s. 4. The 5 Geo. 4, c. 83, is the last of a series of statutes directed, not against such practices as the appellant's, but against vagrancy, and primarily against the Egyptians: see 22 Hen. 8, c. 10; 1 & 2 Ph. & M., c. 4; 5 Eliz. c. 20; and 17 Geo. 2, c. 5, s. 2, which was aimed against "all persons pretending to be gipsies, or wandering in the habit or form of Egyptians, or pretending to have skill in physiognomy, palmistry, or like crafty science, or pretending to tell fortunes, or using any subtil craft to deceive and impose on any of His Majesty's subjects." Those words were altered in 3 Geo. 4, c. 40, s. 3, and the latter again by the present statute 5 Geo. 4, c. 83, s. 4, the former statutes being all repealed. None of these deal with conjuration, witchcraft, sorcery, or the calling up of evil spirits. Such offences are punishable under a different series of statutes: 33 Hen. 8, c. 8; 1 Edw. 6, c. 12; 5 Eliz. c. 16; 1 Jac. 1, c. 12; 9 Geo. 2, c. 5, ss. 3, 4. In 3 Co. Inst., c. 6, p. 43, "Felony by conjuration, witchcraft, sorcery, or enchantment" is fully discussed. See also Lilly's *Life of Himself*, ed. 1774, p. 107, with an account of his own trial for astrology, and Cowel's *Law Dictionary*, as to the distinction between conjuration and witchcraft. Since the last of that series, 9 Geo. 2, c. 5, is still in force, and the appellant might have been convicted under it, the Legislature cannot have intended to create an additional punishment by the Vagrant Act, 5 Geo. 4, c. 83, which was aimed against the wandering and homeless, and is not applicable to a man who has, like the appellant, lived for four years in the same house. Secondly, the justices took a wrong view of the

⁽¹⁾ 34 L. J. (M.C.), 50.

⁽²⁾ 33 J. P., 740.

facts. The appellant pretended nothing, but desired the spectators to judge for themselves.

Poland, for the respondent: In the appellant's construction, the word "otherwise" means "in the same way," or has no meaning at all. But some meaning must be given to the word "other," see *Bows v. Fenwick* ⁽¹⁾; and the clause is manifestly aimed, not at any definite class of imposters, but at all who craftily deceive *simple [274 people by fortune-telling, or by pretending to have super-human knowledge or power. This is the essence of the offence, and within this the appellant comes. It is no answer to this to say that the offence is indictable under another statute, for many of the offences punishable under the Vagrant Act are undoubtedly indictable under other statutes. "Palmistry" is used by good writers in the sense of a trick with the hand: see Worcester's Dictionary; Addison, in the *Spectator* (vol. ii, No. 130), humorously speaks of pocket-picking by beggars as "a kind of palmistry at which this race of vermin are very dexterous." To "palm" means to trick.

Matthews, Q.C., replied.

Cur. adv. vult.

Feb. 6. The following judgments were read:

CLEASBY, B.: It is first necessary to consider what the exact question for our determination is. This must be clearly understood, as there appeared at first to be a difficulty, though of a technical nature, from the terms in which the magistrates had found the facts, and if they had only found that the defendant used artful devices with intent to deceive without themselves forming any conclusion as to the means used, there would have been an objection to the case coming before us on appeal. But it is to be taken, and the words properly bear that meaning, that the magistrates have found that the means set forth in the case were the means used, and to which their express finding applies.

The question, then, before us arises in this way. The magistrates have found as a fact that the appellant used subtle craft, means, and devices, by the means stated, to deceive and defraud Her Majesty's subjects. They have also found as a conclusion of law that the means used bring the case within the statute, and they then ask our opinion upon the correctness of this conclusion upon the matter of law—whether the findings of fact bring the case within the statute. We have nothing to do with the correctness of the

⁽¹⁾ Law Rep., 9 C. P., 339.

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conclusions of fact arrived at by the magistrates. They can only ask our opinion upon matters of law, and we must take the conclusions of fact as found by them. It is right to add, in order to prevent misapprehension, that there was overwhelming evidence to warrant their conclusions.

275] *Now as regards the act of the defendant and the means used by him. We are not called upon to express any opinion upon the subject of spiritualism generally—whether there does exist any real power in a medium (as he is called) of the nature set up, or whether its existence is a mere delusion. Such a subject would be a very improper one for argument and decision in a court of law. But it does not arise in the present case, because we have it found as a fact that the appellant was an impostor in pretending to make use of it. The only question, then, is, whether in this particular case the means used by the appellant are within the words “palmistry or otherwise” in the act in question. We must first see what the means used were. There is a séance for which he is to receive £2. He calls himself a spiritualist; the room is darkened; raps are heard, and he says, “They are soon here to night, the conditions are very favorable.” They then go through the performances described in paragraph 2, and it is sufficient to say that he pretends to exercise the peculiar and supernatural power of obtaining answers and manifestations of power from invisible agents, or “spirits,” as he calls them.

We have to determine whether this brings the case within the 4th section of 5 Geo. 4, c. 83. That section enumerates a great number of offences which make a person liable to be punished as a rogue and vagabond. And the second of the enumerations is as follows: “Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device by palmistry or otherwise to deceive and impose on any of His Majesty’s subjects.” The appellant could not properly be regarded as a person professing to tell fortunes, and was not so charged, and the argument before us was that the words “palmistry or otherwise” must be read as pointing to palmistry which, it was said, was well known to signify forming conclusions from the lines of the hands, and other similar pretensions, such as physiognomy, &c.

It was first contended, and I think with success, that the act of Parliament could not be read as if the words “by palmistry or otherwise” were omitted altogether, so as to make it apply to all subtle devices used to deceive and impose on Her Majesty’s subjects. Some effect must always be given to all the words in a statute creating an offence.

But it was further contended that the words **“or [276 otherwise”* following a particular word, *“palmistry,”* must be read as having reference to arts or pretensions of the same description as palmistry, according to a general rule of construction limiting the effect of general words following a particular description. As to the general rule, no authority was necessary, but a case was referred to in which the Court of Queen’s Bench, in construing the statute and section in question, held that the words *“or otherwise”* must have a limited signification, and were not applicable to the case of a man wagering with people upon tricks of sleight of hand, and so deceiving and defrauding them. The case is *Johnson v. Fenner* ⁽¹⁾.

In such a case no peculiar power is pretended like telling fortunes, or palmistry, to impose upon the credulous, but a great skill of manipulation and sleight of hand, and persons are found confident enough to back their eyesight against the skill and dexterity of the performer. This is so different an act from the acts particularized in the clause that a court would properly hold that you could not apply general words to so very different a thing. But in the present case we are dealing with an impostor exercising a power by a pretended intercourse with the invisible world, a peculiar power belonging to himself. In construing the clause in question we are entitled to consider the whole of it. We are not construing such words as *“palmistry and any other art”* standing by themselves, a case to which the argument used would more closely apply. The clause includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so), or use subtle devices, by palmistry or otherwise, to defraud.

Now the present case is clearly brought within the words *“by palmistry or otherwise”* taken in their natural sense. But the appellant seeks to limit this natural sense by construction, that is, by applying the rule of construction referred to. It appears to me that it would be going beyond any application of this rule to hold that the words *“or otherwise”* (which in their usual sense introduce something new and different), taken in connection with the rest of the clause, only apply to modes of deception of any precise class or genus, if such there be, of which palmistry can be said to be *an instance. It may be quite right to [277 hold that the words do not apply to anything in its character and pretences entirely different from fortune-telling and palmistry. But I cannot regard the arts and pretences of

⁽¹⁾ 33 J. P., 740.

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the appellant as so entirely different. Something besides fortune-telling and palmistry must be held as included, or you must reject the words "or otherwise," which cannot be done. And I could not myself fix upon any crafty devices more properly coupled for punishment with those of fortune-telling and palmistry than those set forth in the case as practised by the appellant.

The learned counsel for the appellant referred to very early statutes showing that the offence of palmistry and the pretending to hold intercourse with spirits had formerly been treated as totally different offences with very different punishments, which was no doubt the case. Palmistry was at one time practised by gipsies and persons leading a vagabond life, and the legislation was directed against them. But the idea of leading a wandering and vagabond life is not now at all an ingredient in the description of a rogue and vagabond, as is obvious by reading the enumeration in s. 4. The statute 5 Geo. 4, c. 83, repeals all the former statutes relating to rogues and vagabonds, and forms itself the legislation on the subject, and enacts in substance that by doing certain things, or neglecting certain duties, a man shall be in the same predicament as rogues and vagabonds, and dealt with as such. Whatever an offender's position may be under other acts of Parliament not relating to rogues and vagabonds, if he comes within the enumeration in s. 4 he is properly punished as a rogue and a vagabond.

For the reasons above given, I think the appellant was properly dealt with by the magistrates as a rogue and vagabond, and that the conviction must be affirmed, and of course with costs.

POLLOCK, B.: In my judgment the justices were correct in the view of the law which they took when they found the appellant in this case to be a rogue and vagabond within the meaning of the statute 5 Geo. 4, c. 83, s. 4.

The first matter material to consider is, what was it that the magistrates found in fact? Taking the evidence which they have set out in the case coupled with their finding, the 278] only fair *conclusion to be drawn is that they found that the appellant did attempt to deceive and impose upon the persons named in the charge, and that the means by which he so attempted was not by mere sleight of hand, dexterous manipulation of instruments, or illusion of the eye or ear such as is practised by a conjuror or ventriloquist, but that in addition to and accompanied with the exercise of physical dexterity, the appellant so conducted himself as to assume the power of communicating with and calling in the

aid of unseen spirits who could do certain acts and produce certain results, such as the winding-up and playing upon a musical box and the communication of messages from persons who had died. We have therefore a craft, means, and device which is beyond that of physical dexterity, and a professed dealing with some spiritual agency which is enacted, not for the mere purpose of individual experiment or so-called scientific pursuit, but to deceive and impose on others. And the only remaining question is whether this is within the scope of the statute.

The words of the act are, "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects." And the well known rule of construction was urged upon us that in giving effect to the words "or otherwise" we must read the statute as if it had used the words "by palmistry or other acts of a like kind." The principle upon which this rule is founded is thoroughly established, and the only difficulty which arises is in the mode and extent of its application to the provision in question. If the only words were, "any person pretending by palmistry or otherwise to deceive," the argument would have greater force, but the language whence the scope and intent of the section are to be gathered is much wider, and to get at this we must look back to the words preceding "palmistry." These show that the character of the act which is made an offence is assuming a special power beyond the ordinary limits of human agency. This is indicated by the first offence specified—"professing to tell fortunes."

Those which follow are of a like character, "using any subtle craft, means, or device, by palmistry or otherwise to deceive," &c. The general character of the means or device is sufficiently indicated by the earlier words, and to [279 read the word "otherwise" as limiting the means to acts which must necessarily be similar to palmistry, would, in my judgment, wrest from the statute its spirit and expressed intention. Reading it as a whole, I should take the word "otherwise" not as limiting the earlier words, but as enlarging the word "palmistry," and providing against the professing to tell fortunes, or using craft, means, or device to deceive, whether by palmistry or by contrivances to deceive other than palmistry, provided they are of the same general character as is indicated by the earlier words of the section.

It is unnecessary now to say what other means or devices may come within the statute; but as to this I should guard myself against being supposed to hold that there might not

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be cases in which the means used were legerdemain, ventriloquism, or the like, and yet that they were included. Whether they would or would not be included must depend upon many circumstances, one very important one being the profession of the performer, and another being the education and means of knowledge possessed by the audience. For instance, persons at the present day hearing an ordinary ventriloquist would hardly say he intended to deceive or impose upon them, but it well might have been in time past, and might be now, that a ventriloquist should endeavor to impose on others by leading them to think that he could carry on a conversation with a relation who had died, and who, when spoken to by him, answered from a chest or closet. Whether this were so or not would be a question of fact for the decision of the magistrates. So would it be in the case of a juggler or conjurer; it would be for the tribunal before which the question was tried to say whether the performer merely backed his skill and agility against the quickness and accuracy of the eyes and ears of those present, as was clearly the case in *Johnson v. Fenner*, which was cited before us from 33d Just. of the Peace, 740, or whether he intended to convey the impression that he was dealing with or assisted by any supernatural agency. In the present case the finding by the magistrates is conclusive, and well supported by the evidence before them.

Our attention was very properly called by Mr. Matthews, on behalf of the appellant, to the fact that the statute in [280] question *is only the last of a series commencing so far back as 22 Hen. 8, c. 10, all of which profess to deal with jugglers and persons pretending to have skill in physiognomy, palmistry, or like crafty science, whereas there has long existed a parallel set of statutes beginning with 33 Hen. 8, c. 8, and ending with 9 Geo. 2, c. 5, s. 4, whose expressed object is to deal with persons using, practising, or exercising any invocation or conjuration of an evil spirit; and he argued that the offence of the appellant, if any, came more properly within the scope of these latter statutes. The offences dealt with by these statutes are fully explained by Lord Coke in his treatise on 1 Jac. 1, c. 12 (3d Inst., 44), and include what in more modern days is commonly called witchcraft, and it is to be observed that by these the dealing with the supernatural is itself made an offence, apart from any deceiving or imposing on others. It may be that the appellant, by doing what he did, brought himself within these acts, but it is unnecessary to decide this, and one would pause before seeking to put in force criminal statutes

pointing to an offence practically obsolete ; but even were his acts within the existing statute against witchcraft, it by no means follows that when he used devices to deceive and impose on others he was not liable under the act in question.

I think, therefore, that the conclusion at which the magistrates arrived is within the statute, and that there is no ground for disturbing the conviction.

Conviction affirmed with costs.

Solicitor for appellant: *W. M. Miller.*

Solicitors for respondent: *Layton & Jaques*, for C. Mills, Huddersfield.

[2 Exchequer Division, 289.]

Jan. 16, 1877.

[IN THE COURT OF APPEAL.]

*GREAVES V. GREENWOOD and Others. [289]

*Inheritance—Pedigree—Heir-at-Law—Claim through a Female—Evidence to prove
Extinction of superior Lines of Descent—3 & 4 Wm. 4, c. 106, ss. 7, 8.*

At the trial of an action for the recovery of land, in 1876, it was proved by the plaintiff that J. F. W. died seised in fee, without issue, and intestate, in 1868; that all the descendants of his paternal grandfather, J. W., were dead, and that the plaintiff was the heir-at-law of the paternal grandmother. On the death of the intestate in 1868 advertisements were published in the London and provincial newspapers, for the heir-at-law of J. F. W., describing his father and grandfather and the property. Several persons came forward, and, besides the plaintiff, no one was able to establish any relationship except the defendants, who were co-heiresses of the mother of J. F. W.; and to whom the tenants of the property had attorned. Deeds, wills, and documents were put in evidence, in which no mention was made of any person who would have been of nearer kin than the plaintiff, beyond those whose deaths were proved. The defendants proved that the paternal great-grandfather had, besides J. W., another son, N. W., born in 1717, and also a sister, a Mrs. M., both of whom were alive in 1755, and that the paternal great-grandmother's maiden name was S. B. But no further evidence as to N. W., Mrs. M., or the B. family was given:

Held, that there was evidence on which the jury might properly find for the plaintiff.

Richards v. Richards (15 East, 294, n.) commented on.

ACTION to recover possession of three houses in Manchester.

At the trial before Brett, J., at the Manchester Spring Assizes, 1876, the plaintiff proved that John Frederick Winterbottom, the purchaser, died in 1868, seised in fee of the houses in question, leaving no issue and intestate as to this property. The paternal grandfather of J. F. Winterbottom was John Winterbottom, of Manchester. He had numerous descendants, and the death of all of them was proved. The plaintiff claimed and proved his title as heir-at-law to the paternal grandmother, the wife of John Win-

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terbottom, the plaintiff being the great-grandson and heir-at-law of her father, Joseph Greaves. Wills and other documents were put in evidence, in which no mention was made of the existence of any person who would have been of nearer kin than the plaintiff, beyond those whose deaths were proved. J. F. Winterbottom died entitled also and 290] intestate as to *some Yorkshire property, and at his death advertisements were inserted, by direction of his widow, in the London and Leeds and Huddersfield newspapers, for the heir-at-law of John Frederick Winterbottom, describing his extraction and the property, and giving the names of his father and grandfather. Several persons came forward (some from the neighborhood of Manchester), but no one was able to establish any relationship, except the plaintiff, who took possession of the Yorkshire property, and the three defendants who appeared to defend as landlords, to whom Greenwood and the other defendants, tenants in possession, had attorned. The defendants were the co-heiresses of the mother of J. F. Winterbottom.

On the part of the defendants, deeds, wills, and certificates were put in, from which it appeared that the father of John Winterbottom, the grandfather, was James Winterbottom, and he had another son, Nathaniel, born about 1717 and alive in 1755; and he had also a sister, a Mrs. Moulton, who was a widow and alive in 1755. It was also shown that the wife of James Winterbottom was Sarah Bent. Nothing further was proved as to Nathaniel Winterbottom, Mrs. Moulton, or the Bent family.

The defendants contended that the plaintiff was bound to give some evidence as to the extinction of those three lines of descent, which were preferable to his own. The judge overruled the objection.

It was agreed that the jury should find a verdict for the plaintiff, and judgment be entered accordingly, leave being reserved to move to enter judgment for the defendants, if the court should be of opinion that there was no evidence upon which the jury could properly find for the plaintiff, the court to have power to draw inferences of fact consistent with the jury having so found.

June 19, 1876. *Herschell*, Q.C. (*Gully*, *W. Barber*, and *A. Dixon* with him), for the defendants, moved accordingly. *C. Russell*, Q.C., *Taylor* and *Aspland*, for the plaintiff.

BRAMWELL, B.: I think that our judgment must be for the plaintiff. The question is, whether there was evidence 291] to go to the *jury upon which they might properly

find for the plaintiff. I think there was. If the plaintiff had simply proved his pedigree, I think that there would have been a case for the jury, but it would have been a case with which the jury, as reasonable men, would have said they were not satisfied. On the other hand, supposing that the plaintiff had shown that the paternal grandfather was illegitimate and had exhausted the descendants of that ancestor, he would have shown conclusively that he was heir. But having shown his own title, is he bound to show negatively that there were no persons who could claim a nearer heirship than that which, to some extent, he has proved? I confess I have considerable misgiving whether he is. I doubt very much whether a person is bound to prove a negative in cases of this description. The common expression is, that the plaintiff must exhaust the possibility that there are other heirs, and give some negative evidence to show that there are no descendants entitled in preference to himself. But I cannot help thinking that the expression must mean that, if this is not done, the jury will be directed, as reasonable and prudent men, to say that they are not satisfied with the case made out. In this particular case, no doubt, there is very great difficulty in supposing that this plaintiff really is the heir, because it is a condition of things which can hardly exist unless we suppose there is some interruption in the pedigree, such as bastardy. But I think if the Act 3 & 4 Wm. 4, c. 106, s. 7, is ever to be applied, it must be applied where one is satisfied, from no one appearing, that no nearer heir to the deceased can be found than the person making the claim. I think there is great weight in the argument that this is a possessory action only, and that another person may, at any future time, if he can make out a title, come forward and displace this plaintiff. I doubt, therefore, very much whether there is any necessity for a man to do more than trace his heirship, and, for prudence and safety's sake, exhaust the possibility of near heirship of modern existence, which he can reasonably be expected to do; but when he gets beyond living memory, and beyond his dealing with it in any way, I doubt whether he is bound to do more than say that he knows nothing about it.

*Now, in this case the plaintiff has exhausted all [292 the persons whom reasonably he could be expected to exhaust; but then it is shown that 120 years ago there were certainly persons in existence, none of whom, we can suppose, are alive now, but each of whom might have married and had children. It is a possibility, no doubt, but I think

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that the plaintiff is entitled to say, "That is a possibility which I am not called upon to negative, or, if I am, I am not called upon to negative it further than this, by showing that inquiry has been made for them, and they have not been heard of." Whether, if there had been any affirmative evidence on the part of the defendants to make one think that such descendants might be in existence, whether in that case, the plaintiff's evidence would have been sufficient to satisfy a jury I do not know; nor whether they might not think that he ought to have made some further inquiries. That is not the question now. Advertisements were put in the papers eight years before the trial, and no claimant has appeared. Is not that, reasonably, all the negative evidence that a person making such a claim can give? It seems to me that it is. And I cannot help thinking that there is something in this, that the defendants are not entirely strangers, but are persons who, to a certain extent, must be taken to be setting up an heirship, though not so near to the deceased man as the plaintiff.

In the first place, therefore, I doubt very much whether any evidence is necessary on the part of the plaintiff, beyond proof of heirship, to go to the jury. He is not called upon to negative what, for convenience sake, I will call a nearer heirship. But, supposing he is called upon to negative it, I think he has done so, because he has given evidence, where it was possible to do so, that is to say, as to things existing within the time of living memory; and he has given negative evidence of no claim being made by descendants of those who are shown to be in existence at a time so remote, that it is presumably impossible to give distinct evidence of their death without issue. I think, therefore, that if he is called upon to give such negative evidence, he has done it.

So much for the reason of the thing. But, in addition to 293] that, *it does seem to me that the case of *Doe v. Wolley* (¹), cannot be distinguished from the present case. There it was shown that there were several brothers between the person from whom the intestate was descended and the brother through whom the plaintiff claimed; of course it was possible that all those brothers might have married and had children, and there was not a particle of evidence given in that case to negative their having done so, except the fact that no such issue had appeared and claimed, and that there were certain instruments put in evidence in which no mention was made of any such posterity. Here also were such instruments; but it was said that it would not be reason-

(¹) 8 B. & C., 22.

able to expect that any mention should be made in them of the descendants of Mrs. Moulton or Nathaniel Winterbottom, but I do not know that in *Doe v. Wolley* ⁽¹⁾ it would have been more reasonable to suppose so. I think, therefore, that that case is really in point. The case of *Richards v. Richards* ⁽²⁾ was referred to, which is, "In ejectment the lessor of the plaintiff claimed as heir by descent, and showed the death of his elder brothers, but not that they died without issue:—*Curia*, this must likewise be proved." That may be taken to be right, it being a matter reasonably within the capability of proof by the plaintiff, not being without the time of living memory, and the persons who were dead being his elder brothers only; I should, with all respect, therefore, say that what the court said so far was right, for it was a thing which the plaintiff could prove, and if he does not prove it the jury would say they were not satisfied that he is the heir. So in this particular case negative evidence as to the more recent relatives is necessary, and that has been given. The note goes on to say, "The plaintiff must remove every possibility of title in another person." But that cannot possibly be correct. There must be some inaccuracy, for all the plaintiff can be called upon to do is to give evidence to show that it is improbable there are any preferable descendants. With respect to this note, which is very short, I must say that I differ from it, except as to the first part of it. I think, upon the whole, that in this case the plaintiff is entitled to our judgment.

*AMPHLETT, B.: I entirely agree with the judgment of my Brother Bramwell. [294

Motion refused.

The defendants appealed.

Jan. 16. *Herschell*, Q.C., and *W. Barber*, (*Gully* with them), for the defendants: By 3 & 4 Wm. 4, c. 106, s. 7 ⁽³⁾, the heir through a female paternal ancestor cannot inherit until the male paternal ancestors are shown to have failed. The plaintiff is no doubt heir of the paternal grandmother, and, as such, has a better title than the defendants, who claim under the mother; but before he can recover and turn

⁽¹⁾ 8 B. & C., 22.

⁽²⁾ 15 East, 294, n.

⁽³⁾ 3 & 4 Wm. 4, c. 106, s. 7: "None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and no female paternal an-

cestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and no female maternal ancestor of such person nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed."

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out the defendants, who are in possession, he must show that there are no heirs of the grandfather in existence, or, at all events, none discoverable by inquiry. The *onus* is on the plaintiff, and he has not proved the failure of such heirs. He has not made sufficient inquiry. It was not necessary for the defendants to give any evidence, but they did prove that there had been relations of the paternal grandfather who might have left descendants. It was no part of the defendants' duty to find out such descendants, who could of course recover against both plaintiff and defendants, but they have a right to call on the plaintiff to prove his own title, and to show that there are no such persons. The defendants are in possession, and it is not enough for the plaintiff merely to prove that he was the heir of the grandmother, and so has a better title than the defendants, who are heirs of the mother. In order to recover he must show an absolute title. There is no presumption in his favor: *Doe v. Wolley* ⁽¹⁾; *Doe v. Deakin* ⁽²⁾; 1 Tayl. Ev., § 156; *Richards v. Richards* ⁽³⁾. The rule is well shown in the American case of *Emmerson v. White* ⁽⁴⁾. If the plaintiff 295] *recovers and compels the tenants to pay rent, the heir of Nathaniel Winterbottom may by-and-by appear and compel the tenants to pay over again.

C. Russell, Q.C., and *Aspland*, for the plaintiff: If the defendants succeed, the 7th section of the act will become all but nugatory, as it will be impossible for any one to succeed as an heir through a female, unless one of the male ancestors was a bastard; for in no other case can it be shown positively that there are no heirs of a male paternal ancestor: Hubback on Succession, p. 227. The act must mean that unless an heir is forthcoming he must be presumed not to exist. Inquiry has been made, and persons came to claim, but failed; and what more could the plaintiff do? All that the defendants have done is to show that, 120 years ago, persons existed who may have left descendants, of whom, however, no trace is found.

Herschell, Q.C., in reply.

COCKBURN, C.J.: I think that the judgment of the court below should be affirmed. I quite agree in the position taken by Mr. Herschell, that there is no presumption in a matter of this kind. If it is proved that long ago a man died, and there is nothing to show whether he died with issue or without issue, I agree in the American doctrine

⁽¹⁾ 8 B. & C., 22.

⁽²⁾ 3 C. & P., 402.

⁽³⁾ 15 East, 294, n.

⁽⁴⁾ 9 Foster, New Hampshire Rep., (1854), 482.

that there is no presumption either way. But then comes the question whether there was here, independently of any presumption, evidence proper for the consideration of a jury that the male paternal line of the Winterbottoms had become extinct, and that, consequently, the heir on the female side was entitled. Now, it appears that the grandfather of John Frederick Winterbottom, who has died intestate as to the property sought to be recovered in this action, had a brother, Nathaniel, who was born in 1717, and there is therefore a good presumption that he has long since been dead. But the question arises whether Nathaniel had any issue. Granting that there is no presumption either way, how is the fact to be ascertained? It might be ascertained by positive evidence, such as an entry in a register, or in a will, or other instrument, in which reference was made to him as having children or not having children; but there is no such evidence. We have, however, this evidence: *there [296 is a large property in various counties, the subject-matter of inquiry and of dispute; the widow of the man last seised, with the honest desire of ascertaining whether he had any heir, and if so, who that heir was, caused advertisements to be inserted in the general and local papers, with a view of ascertaining whether any male heir or any heir of the male line could be found; and it is clear that these advertisements were circulated to a considerable extent, because we have the fact proved that numerous persons came forward, each endeavoring to make out his right to be considered and dealt with as the heir, but all of them failed to establish their relationship. This, I agree, is by no means conclusive. The real heir may still be somewhere, ignorant of this inquiry, ignorant of these claims, ignorant of all that has taken place. But as a century and a half has elapsed since the man was born, as to whom the inquiry whether he had children or not is made, and as there is not any trace of any issue of his, and as nothing of such issue was known to any member of the family, or to any of the relations, and as, after an advertisement of this kind, no one has come forward who has been able to substantiate his claim, I cannot say—however inconclusive such proof may be—that there was not some evidence on which the jury might act. It is difficult to believe, after all that has taken place; all that has been known upon this subject, including the trial of this ejectment, that if there were any persons who could have made out their claim as being the descendants of Nathaniel Winterbottom, they would not have come forward. It is just possible, no doubt, that there may be some person in exist-

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ence who could make out his claim, but I think the jury may very properly have looked at the case in the way in which I have put it, using their common sense. A property of this sort does not usually go begging. Every one of the name of Winterbottom is put on the *qui vive* to see if it is not possible to make out a descent from Nathaniel Winterbottom. I cannot say, therefore, that there was no evidence to go to the jury, and I think the decision of the court below must stand. That is all we have to determine. We have not to determine what we should have done as jurymen, nor what we should have done if we had had to sum up the case to the jury; all we have to determine is, was there evidence proper for their consideration?

297] *BAGGALLAY, J.A.: I am of the same opinion. A reasonable interpretation must be given to the 7th section of 3 & 4 Wm. 4, c. 106; and if the interpretation which has been put forward is to be adopted as regards the failure of all paternal ancestors and their descendants, it would be impossible for a descendant of a maternal ancestor to succeed, except in the case of some paternal ancestor being illegitimate. It would be necessary to go back to the very remotest antiquity before it could be said that the paternal line was exhausted. I think the true meaning of the section is that, when there is no reasonable possibility of ascertaining that there are descendants from the paternal ancestors—I mean, of course, a reasonable possibility, after due and sufficient investigation and inquiry,—and what may be a due and sufficient investigation must depend on the circumstances of the case,—then descendants of the maternal ancestors must be sought for. In the present case all the descendants of paternal ancestors who have been born within 150 years have been exhausted. The intestate was the last of those descendants. Therefore, we are considering a case in which certainly there has been a very full and very complete investigation.

It may be, no doubt, that, if we were to go back further, relations of females in the paternal line might be discovered, from whom it is suggested that there may be a descendant. It is suggested also that, as it has been proved that there was one Nathaniel, who was a descendant of a paternal ancestor and was born as long ago as the year 1717, it is possible that there may be some descendants of his still alive. I think the facts which are proved, of the birth of this Nathaniel in 1717 and of his being alive in the year 1755, if we proceeded no further in the investigation (although it is no very important element for our consideration), are evidence to be

considered. But we have also this additional fact. The intestate having died eight years before the trial, an advertisement was published in different papers, calling on the heir-at-law of this intestate to come forward, particularizing not only the intestate himself but his father and grandfather, and particularizing also where the property was situate. Those were all circumstances tending in themselves to induce persons, who might think that they might be or were the relatives of the intestate, to *come forward and show [298 whether there was a failure of descendants of paternal ancestors. All those were facts for the consideration of the jury. I am bound to say that in this case I should have been quite as well satisfied if, upon the evidence before them, the jury had come to the conclusion that the plaintiff had not established his case as heir-at-law; but that was for the jury to decide, and it is not for me to express an opinion. If, then, there was evidence for them to consider, and on which they might find a verdict, we cannot on any ground which has been urged before us, disturb it. I think the decision at which the Court of Exchequer have arrived is, on the whole, correct and must be affirmed.

BRETT, J.A.: I am of the same opinion. It seems to me that we are not called upon or bound to lay down any new rule as to the law of inheritance. I agree that, inasmuch as the plaintiff was bringing an action of ejectment, it lay upon him not merely to prove that he was what may be called the nearest relation, but to prove that he was the heir-at-law; and I agree that, as he was claiming through a maternal ancestor, it was necessary that there should be at the trial reasonable evidence that the paternal line was exhausted, and also that the superior maternal lines were exhausted. But the question is whether there was such reasonable evidence on both points as ought to have been left to the jury. If there was not, I, who tried the case, ought to have nonsuited the plaintiff. The point of time in the trial, which we are bound to consider, is not the end of the plaintiff's case, unless the defendant proposes to leave the case there. If the defendant adduces evidence, the question will then properly arise whether the plaintiff ought to be nonsuited. If, by any addition which the defendant makes to the case, he shows that there is no reasonable evidence of the exhaustion of the paternal line and of the superior maternal lines, then he may be entitled to a nonsuit, but if there is reasonable evidence there cannot be a nonsuit. Now, upon the question whether there was reasonable evidence in this particular case, it is quite unnecessary to consider what was

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the evidence in any other case. It seems to me that a great many circumstances were proved here which are material. 299] It is material that there have been *claims made not only as to this property which is in dispute, but as to other property belonging to the same intestate. The defendants were also members of the family, and came forward claiming as heirs-at-law. Now I think it is but reasonable to assume that they must then have made some inquiry into the family history, because it was necessary for them to do so in order to see if they could support a claim to the Yorkshire property as against the present plaintiff. Then there has been this litigation, and the plaintiff has inquired into the family history, and having gone through the family for more than 100 years, he has certainly exhausted, within that 100 years, all the family of whom he could find any trace, and having done that, he has gone to the female ancestor through whom he claims. It is also very material to consider the inquiry made by the widow of the intestate. It is clear that she (who had herself made no claim) meant that those inquiries should be honestly made. She employed a firm of solicitors well known and of the highest respectability, who put in those advertisements which, under the circumstances, must, I think, be taken to have been entirely honest, and intended to find out who was the heir-at-law. It may be that a better form of advertisement might be suggested, or that a fuller form might have been used; but we are not here deciding upon the sufficiency of the form, but whether there was evidence proper to be left to the jury, and sufficient to enable them to decide whether reasonable inquiries were made by means of those advertisements or by other means. It was for them to say whether the advertisements were or were not sufficient, and I think they might properly come to the conclusion that they were. Then on the trial the defendants show the closeness of the inquiries they had made by going beyond the 100 years, and showing the existence of this Nathaniel Winterbottom. No doubt it was in one sense skilful on their part to stop at Nathaniel, and to make no further inquiry as to whether he had any issue, or had ever been married. But I cannot say that it would have been good tactics to have stopped there if the defendants could have shown that Nathaniel had issue. I agree with Sir George Bramwell that we should require the plaintiff to give more evidence of a negative as to occurrences within the last century than we should require as to occurrences before the last century, because he would *have 300] easier means of proving a negative. I think that that is

not an artificial distinction, but is a good and practical view of what you would reasonably expect a man to do; therefore, it would have been to the advantage of the defendants if they could have shown that Nathaniel was a married man and had children of that marriage, but they advisedly stopped short of that. Then we have the fact that, notwithstanding the advertisements, no single claimant has come forward to say that he is the representative of Nathaniel.

Taking all those circumstances into consideration, the jury would have been, in my judgment, justified in saying that they were satisfied that there was no descendant of Nathaniel. If that is so, we have got rid of the Winterbottom family, and are driven to the Bents and Moults. I do not think it necessary to go back 150 years to get rid of those lines of descent. Nothing is proved with regard to them by either side, and I think we cannot expect the plaintiff to go back for that purpose. In my mind, the objection to Mr. Herschell's argument throughout is that it goes too far; it is a solid objection to that argument that according to it no person claiming through a maternal line can succeed unless he exhausts all the male paternal ancestors who ever existed. That cannot be the meaning of this statute. If the evidence goes back as far as the evidence did in this case, that is to say, for 150 years, that is sufficient. And unless something is shown to throw doubt upon the want of appearance of any descendants, it is not enough to say by way of argument, because the argument is equally conclusive on the other side, that there must be other people either on the paternal or maternal lines. Of course there must be, but they have gone into the vast multitude of the world, so that they cannot be taken notice of. Therefore I think that this judgment should be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *Torr & Co.*

Solicitors for defendants: *Currie, Williams & Co.*

See 18 Eng. Rep., 677 note; 2 Whart. Ev., § 1320, a.

Where, after a reasonable period, after it is for the interest of the issue of parties, if living, to come forward and claim their rights, none appear, it may

be presumed that such parties died without issue: Earl of Roscommon's Claim, 6 Clark & Fin., 97, 120-6, 128-130; Doe v. Wolley, 8 Barn. & Cress., 22, (15 Eng. Com. Law Rep.); Best on Presumptions, § 109.

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Murphy v. Manning.

[2 Exchequer Division, 307.]

Jan. 19, 1877.

307] *MURPHY, Appellant; MANNING and Another, Respondents.*Cruelty to Animals—Cutting Cocks' Combs—12 & 13 Vict. c. 92, s. 2.*

Upon an information against the respondents, under 12 & 13 Vict. c. 92, s. 2, for cutting the combs of cocks, evidence was given that the operation caused very great pain, and was inflicted in order to fit the birds for one or other of two purposes; cock-fighting or winning prizes at exhibitions. The magistrates having referred to the court the question whether the case was one of the class contemplated by the statute:

Held by Kelly, C.B., that the respondents did, as a matter of fact, "cruelly ill-treat, abuse, or torture the birds;" that, as a matter of law, the act could not be justified by the purpose of cock-fighting, and that the respondents ought to have been convicted.

By Cleasby, B. (without expressing any opinion upon the facts), that neither the purpose of cock-fighting nor that of winning prizes at exhibitions would prevent the case from being within the statute.

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions at Sittingbourne, in Kent, on the 17th
308] of *January, 1876, two informations were preferred by the appellant Murphy, inspector to the Rochester and Chatham branch of the Royal Society for the Prevention of Cruelty to Animals; (1,) against Manning, veterinary surgeon, for having, on the 20th of November, 1875, at Rainham, unlawfully and cruelly ill-treated three cocks; and (2,) against Sayer, the owner of the cocks, for unlawfully causing them to be so ill-treated contrary to 12 & 13 Vict. c. 92, s. 2⁽¹⁾.

The appellant stated that on the 27th of November he went to Sayer's house, and saw three bantam cocks. Their combs had been cut off as closely as it could be done, and there were unhealed scabs, the effect of a wound, on their heads. Sayer said he had been told at the Crystal Palace that unless the combs were off he could obtain no prizes, which was the only reason for having it done. The next day the appellant saw Manning, and asked him as to the cutting of the combs, and he said he did it at Sayer's request for the purpose of exhibition. The appellant asked Manning if he did not consider it caused pain. Manning replied that there was a measure of pain, but he did not think it

(¹) 12 & 13 Vict. c. 92, s. 2: "If any person shall, from and after the passing of this act, cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-

driven, abused, or tortured, any animal, every such offender shall, for every such offence, forfeit and pay a penalty not exceeding five pounds."

very great, it was soon over; the birds winced their heads during the cutting, and bobbed them two or three times when cut. He mentioned that he had been in the habit of doing it more or less for forty years past. On cross-examination, appellant said he could not say whether the birds were cocks or cockerels; he took them to be full-grown birds.

The police constable stated that they looked as though they had been just recently cut. They were full-grown birds, duck-winged.

James Broad, a member of the council of the Royal College of Veterinary Surgeons, stated that in his opinion great pain was caused to cocks in cutting their combs. The removal did not prevent the cock from suffering disease; the only object was for fighting purposes, he knew of no other cause for cutting them. *On cross-examination he [309 admitted that he had never done it himself nor seen it done; that it might be done in a minute. There was no portion of the comb without a nerve which communicated with the spinal cord; it was a tissue of blood-vessels.

W. H. Jones, a member of the College of Veterinary Surgeons, stated that in his opinion the cutting would cause pain. There were nerves separated in the cutting off the comb. The fact of their wincing showed this. On cross-examination he admitted that he had never cut a comb or seen it done, and that blood was no proof of pain. He had studied the habits of fowls.

Frederick Crook, one of the judges of the Crystal Palace Poultry Show, stated that it was detrimental to a cock to cut its comb. It depended upon the class in which a bird was entered, whether or no it would disqualify the bird. There were exhibition classes in which it was the practice to "dub" birds, and there were also classes in which it was the practice not to have them "dubbed."

Harrison Weir, an animal painter and artist, said he had spent a good deal of time in studying the habits of birds and animals, and, in his opinion, "dubbing" spoiled the look of the bird, and must be very painful. He would not interfere with nature.

For the respondents, it was contended, that the combs were cut for the purpose of their being exhibited, and that it was clear, from the evidence of Mr. Crook, that the practice was for game cocks to be dubbed; that, so far from the operation of dubbing being cruel, it was for the real benefit of the birds themselves, inasmuch as in case they quarrelled or fought with one another in the fowl-pen or yard, they

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could not pull one another by the comb, in which way they often injured themselves; and that such an act did not come within the statute.

George Barker, who was a veterinary inspector to the corporation of Gravesend, and had had sixteen years' experience in veterinary matters, said, that cutting the comb of a game cock would decidedly not create much pain. He called a comb a fleshy excrescence, and said it had never been proved that it contained nerves communicating with the brain. He considered it an advantage to game birds to have their combs cut, as it prevented their fighting with one 310] another. He said it was an ordinary *practice to do it in farm yards in Lincolnshire, where he had cut hundreds; it took a quarter of a minute, and the bird would eat directly, and did not appear to suffer. The comb, in his opinion, did not contain a nerve vein; there were blood-vessels. In frosty weather the comb gets frost-bitten. He did not consider it cruelty.

The justices, being of the opinion that the offences charged were not of the class contemplated by the statute, dismissed the informations.

The question for the court was, whether their decision was right.

Waddy, Q.C. (*Morton Smith* with him), for the appellant: Webster's Dictionary defines "cruelly" as "with cruelty," and "cruelty" as a "barbarous deed, any act of a human being which inflicts unnecessary pain." Is the operation of dubbing unnecessary pain? If it is, then it is cruel. It is admitted that the pain can be inflicted for only two purposes, viz., to prepare the birds for exhibition, and to render them less likely to be injured when fighting. Cock-fighting is illegal, and therefore there is no necessity that the birds should be prepared against contingencies which could not happen in lawful course. As to the other point, the court will not say that it is right that pain should be inflicted simply to satisfy some arbitrary requirement of people who wish to see the birds exhibited in a particular shape. Suppose there was a prize for one-eyed dogs. Would a man be justified in putting out one eye of his dog to qualify it for exhibition? If people cannot obtain prizes without cutting the combs of these cocks, they must go without prizes, or they must get the regulations altered; it is none the less cruelty because they only conform to the rules of an exhibition. In 5 & 6 Wm. 4, c. 59, s. 2, upon which the section in question is based, there appears another word which is purposely left out of the present stat-

ute—the word “wantonly.” Wightman, J., in *Budge v. Parsons* (¹), said, “the cruelty intended by the statute is the unnecessary abuse of the animal.” It was not necessary that the birds should be exhibited, or if exhibited that their combs should be cut any more than their neck should be broken. Trimming sheep, by cutting off their tails for sale at fairs, would be *within the statute. The castra- [311] tion of horses would not, because that is not done for mere profit.

[KELLY, C.B.: The act may be cruel in the sense that it gives pain: yet the cruelty may be legalized by reference to the object with which it is inflicted.]

To justify the pain it must be for the necessary use of the animal. No one can say that it is for the necessary use of the animal that it should be exhibited. Take the case of terriers used for ratting. Would it be lawful to cut the ears of terriers that they might not be worried or laid hold of by rats? or because a person could not obtain prizes unless the ears were so cut?

Biron, for the respondents: The question whether dubbing is cruelty or not is one entirely of fact for the magistrates, and they having given their decision, this court cannot review it. But if that question be open it is clear that the mere infliction of pain *per se* is not within the statute, else to flog a restive horse would be cruelty. The question is whether the pain inflicted is of such a degree as to amount to cruelty; but that is a question not of law but of fact, for the decision of the justices. But even if it were for the court to decide as a matter of law whether this dubbing is cruelty or not, it does not at all follow that it is cruelty within the meaning of the penal statute because the act done inflicted a certain amount of pain. And it is the amount that is here in controversy. Two gentlemen called in support of the informations were of opinion that the amount of pain inflicted by the cutting of the combs was very considerable; a veterinary inspector, called for the respondents, gave it as his belief that the pain was very slight indeed, for the reason that the birds would eat within a minute or two of the operation being performed upon them. According to the appellant's argument, one would imagine that dubbing was the only operation performed upon cocks; but there is another, called “caponizing,” which is infinitely more barbarous, but which enables the bird to put on flesh, and to become more adapted for the table. No one can say that this is for the bird's advantage,

(¹) 3 B. & S., 382, at p. 385.

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though it may be for the benefit of the consumer. But it must be taken that the justices exercised a fair judgment; and that they came to the conclusion that so far from 312] *dubbing being cruel it was really for the benefit of the birds, as it prevented them from hurting each other when fighting as much as they would otherwise do. It is said to be illegal for cocks to fight; but game cocks do fight in the farm-yard; and if they can injure each other more with their combs uncut than when dubbed, surely it is humane to deprive them of the power to mangle each other. By an operation, which is over in half a minute, a bird for its whole life may be saved the risk of being mangled. If this operation be not done with a reckless, foolish purpose, but with a *bona fide* intention of improving the bird, then it is not cruelty within the statute. The ears of fox hounds are rounded to make them more comfortable in the pursuit of game. They are less likely to be caught in the brambles when going through the woods at full speed. The appellant must go further than showing that, in the strictest sense of the words, the pain inflicted by dubbing is not necessary for the good of the animal or the use of man; he must show that the act was purposeless, and without any ulterior intention to benefit the bird, or to make it more happy in after life or more useful to mankind.

Waddy, Q.C., in reply: Admittedly the dubbing was not performed to benefit the birds, but simply to put money in the shape of prizes into some one's pocket.

KELLY, C.B.: I do not hesitate to say that I am most clearly of opinion that the decision of the magistrates was wholly incorrect, and that the respondents ought to have been convicted. The first question is, "Is it cruel to cut the combs of these cocks? Now I admit there are some acts which are cruel in the extreme, and no legislation can make them otherwise, yet they are perfectly lawful and not within the act, because they are done for some lawful purpose—as, for instance, the cutting of horses. The purpose and object may be such as to legalize acts which would otherwise be within the statute. So as to the much milder operations upon sheep and dogs, and many other cases which might be put. But I do not enter into those questions now. It is enough to deal with cases when they arise. The present 313] case, with which alone *I deal, is one which causes not only pain, but torture. No one can doubt that to do it is to "cruelly ill-treat, abuse, and torture" the animal. One witness treats it as a light matter. I disregard his evidence altogether. I entirely believe the evidence of the

member of the Royal College of Veterinary Surgeons, who said it gave great pain. In cross-examination he asserted, and, I should say, was proud to assert, that he had never himself done it. The excision of the nerves from the animal's head must cause harrowing pain. We cannot define the measure, but it must be very severe. There is the obvious and visible effect of the operation on the bird. He winces, and throws his head up and down. The fact that it is done quickly does not make any difference. Let any one try to hold his hand over a flame for two seconds, and I think he would say that half a minute, not to say a minute, was a long time for an operation of this kind. Then the question is, is there any purpose or reason which can legalize or justify an act of such extreme barbarity? To my mind the object, as shown by the whole of the evidence, is that the animals may be used for cock-fighting. This, which once was legal, is now illegal. Taking off the combs makes them more fit for fighting. It is cruelty, and an abuse and ill-treatment—the very words in the act. As it does not better fit the animal for the use of man or for any other lawful or proper purpose, it is wholly unjustifiable, and is a criminal act which comes within the statute.

CLEASBY, B.: The magistrates have, as I understand, found the facts, and referred to us as a matter of law whether the case is within the statute. If, instead of stating the case in that way, they had found as their conclusion of fact that pain was not inflicted under such circumstances, or to such an extent as to amount to cruelty, there would have been no case for us to consider. But they have not so stated the case; therefore I think they have not drawn that conclusion. They thought, however, that the purpose for which the act was done was such that it was one of a class of cases not within the statute, and upon this they ask our opinion. I do not agree in that conclusion.

Undoubtedly every treatment of an animal which inflicts pain, even the great pain of mutilation, and which is cruel in the *ordinary sense of the word, is not necessarily [314 within the act. Many cases were put in the course of the argument in which it is clearly not so. Whenever the purpose for which the act is done is to make the animal more serviceable for the use of man the statute ought not to be held to apply. As was said by Wightman, J., in *Budge v. Parsons* ⁽¹⁾, the cruelty intended by the statute is the *unnecessary* abuse of the animal. Neither cock-fighting, nor the

(¹) 8 B. & S., 382, at p. 385.

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chance of a prize at an exhibition, is such a purpose as prevents the word "cruel," as used in the act, from applying.

Case remitted to the magistrates with this opinion.

Solicitor for appellant: *Leslie*.

Solicitor for respondents: *Dollman*, for Hayward, Rochester.

See Bishop's Stat. Crimes, §§ 1093-1118.

To treat a dumb beast under the care of man with cruelty is a misdemeanor at common law: *Ross's Case*, 3 City Hall Rec., 191.

But see 1 Bish. Cr. Law (6th ed.), §§ 594-7.

A single blow with a club, which deprived a horse of life under circumstances which evinced that the killing was not the result of deliberation, has been held not to be such cruelty as

subjected the inflicter to indictment at common law: *Ross's Case*, 3 City Hall Recorder, 191.

In New York, by statute, the driver and conductor of a horse car are liable to indictment and punishment for cruelty to animals if they overdrive the horses, suffer the car to be so overloaded beyond the ability of the horses attached to it to draw it: *People v. Tinsdale*, 10 Abb. Pr., N.S., 374.

See also *Com. v. Brigham*, 108 Mass., 457.

[2 Exchequer Division, 314.]

Jan. 25, 1877.

SKEET V. LINDSAY.

Statute of Limitations—Acknowledgment of Debt—Implied Promise to pay.

The defendant, whose debt to the plaintiff was barred by the Statute of Limitations, wrote to the plaintiff within six years before action the following letter: "I return to Shepperton about Easter. If you send me there the particulars of your account with vouchers, I shall have it examined and check sent to you for the amount due; but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim."

Held, that the debt was revived, as the request to be furnished with an account with vouchers at a particular time and place did not negative the implied promise to pay arising from the admission of a balance due.

DEMURRER to a replication. The claim was debt for horse hire and hay and straw supplied by the plaintiff to the defendant in 1868. The defence was the Statute of Limitations, to which the plaintiff replied that the case was taken out of the statute by the following note, written by the defendant within six years of action brought and signed by him: "Your note and its inclosure have been forwarded to me here. I return to Shepperton about Easter. If you send me there the particulars of your account with vouchers, 315] I shall have it *examined and check sent to you for the amount due; but you must be under some great mis-

take in supposing that the amount due to you is anything like the sum you now claim."

Demurrer.

Jan. 25. *J. Brown*, Q.C. (*A. L. Smith* with him), for the defendant: The letter shows nothing more than that the defendant was willing to pay conditionally, but the condition has not been performed. [He referred to *Smith v. Thorne* ⁽¹⁾; *Chasemore v. Turner* ⁽²⁾; *In re River Steamer Co., Mitchell's Claim* ⁽³⁾; *Hales v. Stevenson* ⁽⁴⁾; *Quincey v. Sharpe* ⁽⁵⁾.]

J. O. Griffiths, Q.C. (*Wilberforce* with him), for the plaintiff: The whole of the letter must be taken together, and it shows an admission of an outstanding account, which raises an inference of a promise to pay. To this promise the request to be furnished with vouchers is not a condition, but only suggests a mode of arriving at the balance. [He referred to *Prance v. Simpson* ⁽⁶⁾; *Sidwell v. Mason* ⁽⁷⁾; *Colledge v. Horn* ⁽⁸⁾; *Gardner v. M' Mahon* ⁽⁹⁾.]

J. Brown, Q.C., in reply.

Cur. adv. vult.

Jan. 30. *CLEASBY*, B., read the following judgment. This case was argued before me. The only question is whether a particular letter set out in the reply is such an acknowledgment of a debt as takes the case out of the operation of the Statute of Limitations. In the excellent argument which took place before me the only question argued was that to which the case is properly reduced. That question was whether, coupled with an absolute acknowledgment of a debt, there is in the present case such a conditional promise to pay as negatives the promise which would be implied from an absolute acknowledgment of a debt taken by itself.

It was very properly not contested that an absolute acknowledgment of a balance has the same effect, so far as the present question is concerned, as the acknowledgment of a particular sum. It was also not contested that it is settled conclusively by the *authorities on the subject, beginning with *Tanner v. Smart* ⁽¹⁰⁾, that an absolute acknowledgment of the debt by itself is sufficient, because you may imply from it an unconditional promise to pay the debt, but an absolute acknowledgment of the debt coupled with any-

⁽¹⁾ 18 Q. B., 134.

⁽²⁾ Law Rep., 10 Q. B., 500.

⁽³⁾ Law Rep., 6 Ch., 822.

⁽⁴⁾ 7 L. T. (N.S.), 317; 8 L. T. (N.S.), 798.

⁽⁵⁾ 1 Ex. D., 72.

⁽⁶⁾ Kay, 678.

⁽⁷⁾ 2 H. & N., 306; 26 L. J. (Ex.), 407.

⁽⁸⁾ 3 Bing., 119.

⁽⁹⁾ 3 Q. B., 465.

⁽¹⁰⁾ 6 B. & C., 603.

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thing which showed that the debtor only promised to pay it on a particular event happening, or a particular condition being performed, is not sufficient to revive the original debt payable on request.

The law on the subject is most clearly summed up by Melish, L.J., *In re River Steamer Co., Mitchell's Claim* (1): "There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied, or secondly, there must be an unconditional promise to pay the debt, or thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."

Many cases have arisen in which the question decided has been whether particular words constituted such a conditional promise as to negative the promise which would be implied from an unqualified acknowledgment. Instances may be put on both sides which would be clear. If the words used were that the debtor would pay if he recovered from an illness and could attend to business, or if he succeeded in a law suit in which he was engaged, such words would import that in those events only a fresh promise to pay was made, and there would be no implied promise to pay on request; but if the words were that he would look over the account and pay when he met his creditor on the next market day, these words would not import that he would only pay in that event, and the original promise would be revived.

Among the cases referred to in the course of the argument are *Hales v. Stevenson* (2), *Chasemore v. Turner* (3), *Sidwell v. Mason* (4), *Gardner v. M'Mahon* (5), *Quincey v. Sharpe* (6).

When the question is, what effect is to be given to particular words, little assistance can be derived from the effect 317] given to other words in applying a principle which is admitted. A similar question to the present one was much considered in the above cited case of *Chasemore v. Turner* (3) on appeal, where there was difference of opinion among the judges, Lord Coleridge differing from the rest of the court. But there was no difference as to the rule to be applied. The difference was more as to the meaning of the words used than the legal effect of them, if the meaning was ascertained. The words in that case were, "The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs

(1) Law Rep., 6 Ch., at p. 828.

(4) 2 H. & N., 306; 26 L. J. (Ex.), 407.

(2) 7 L. T. (N.S.), 317; 8 L. T. (N.S.), 798.

(5) 3 Q. B., 561; 26 L. J. (Ex.), 407.

(3) Law Rep., 10 Q. B., 500.

(6) 1 Ex. D., 72.

arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands." It is not surprising that there was a difference of opinion. Lord Coleridge thought those words imported a condition that the affairs were arranged, but the majority of the court, consisting of five judges, thought that those words did not in any reasonable sense express an intention of the defendant that the plaintiff should not be paid unless the affairs were arranged. They considered that the non-happening of such an event as the arrangement of the affairs was not contemplated, but the happening of that event was assumed, and then a convenient time pointed out for the payment. This case was certainly as near the line as any one which has been so decided, and the judges considered it so.

But the present case appears to me a much clearer one. The words are, "I return to Shepperton about Easter. If you send me there the particulars of your account with vouchers, I shall have it examined and check sent to you for the amount due; but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim."

The latter part is a clear and absolute acknowledgment of a balance being due. Does the former part upon any reasonable construction import that the balance is only to be paid in case the plaintiff sends to Shepperton (where the defendant was to return about Easter) the particulars with vouchers? Is it not rather a mode of arriving at the correct balance, which the defendant engages absolutely to pay? It appears to me that the latter is the proper effect to be given to it, and that there is not such a *condition [318 imported as to negative the promise to be implied from the absolute acknowledgment.

The learned counsel relied upon the form of the sentence being in express terms a condition commencing with the word "if." But we must, in giving the proper effect to a passage, look not at the form so much as to the substantial meaning of the language.

For the above reasons I think the acknowledgment is sufficient, and the plaintiff entitled to judgment and with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Worthington, Evans & Cook.*

Solicitors for defendant: *Trinders & Curtis Hayward.*

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See 14 Eng. Rep., 827 note.

In Pennsylvania, to revive a claim barred by the statute of limitations, there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained and an unequivocal promise to pay.

The maker of a note that was barred by the statute of limitations wrote to the holder: "I have received a letter from you sometime ago, asking of me what I intended doing with balance of

note I owe you," and after speaking of an arrangement to pay another creditor with whom he had compounded, continued, "and after he is paid I will pay you all I owe you, and if I can do anything for you before that time I will do so. You need not trouble yourself about me that I will not pay you, for I expect to pay all I owe." Held, that these acknowledgments and promises were neither certain nor perspicuous enough to take the case out of the operation of the statute: *Miller v. Baschore*, 83 Penn. St. Rep., 356.

[2 Exchequer Division, 318.]

Feb. 13, 1877.

HAND V. HALL.

Lease—Option to Lessee to continue Holding beyond Three Years—Statute of Frauds
(29 Car. 2, c. 3), ss. 1, 2—8 & 9 Vict. c. 106, s. 3.

A lease, not under seal, for an original term of less than three years, whether by parol or in writing, is invalid, if it gives a right to the lessee to continue the holding beyond three years from the making of the lease.

THIS was an action to recover one quarter's rent, alleged to be due under an agreement signed by both the plaintiff and defendant, but not under seal, of which the following is the material portion:—

"1876. Jan. 26.

"Memorandum.—Samuel Hand agrees to let, and John William Hall agrees to take the large room on the south end of the Exchange, Wolverhampton, from the 14th day of February next, until the following Midsummer twelve months, and with right at end of that term for the tenant, by a month's previous notice, to remain on for three years and a half more. The rent for such term (original or renewed) to be at the rate of £120 a year."

The defendant did not enter under this agreement, which contained other terms on which questions were raised to which it is not necessary to refer. At the trial before Brett, J., at the Staffordshire Summer Assizes, 1876, it was admitted that if the defendant was liable, a quarter's rent was 319] due, and, thereupon, *judgment was entered for the plaintiff, leave being reserved to move to set it aside, and enter judgment for the defendant.

Feb. 13. *H. Matthews*, Q.C., and *Baldock Stone*, moved accordingly: They contended first that this was an agreement for a lease, and not itself a lease, and that as no pos-

session had been taken under it, an action for rent would not lie; and secondly, that if the memorandum was a lease it gave the tenant a right to a term of more than three years, and not being by deed was invalid.

J. J. Powell, Q.C. (*Underhill* with him), for the plaintiff, contended that the memorandum was a lease for a term not exceeding three years from the making thereof, and was within the exception of s. 2 of the Statute of Frauds.

H. Matthews, Q.C., in reply.

Cur. adv. vult.

Feb. 15. The judgment of the Court (Cleasby and Pollock, BB.) was delivered by

CLEASBY, B.: This action was brought to recover rent under a lease. The plaintiff and defendant had both executed a document not under seal purporting to be a lease. There had been no occupation under it, but the time for payment of a quarter's rent had expired.

There were two defences: one on the document itself, and the other on matter extrinsic: first, that by the effect of the Statute of Frauds and the Statute 8 & 9 Vict. c. 106, s. 3, it was not a valid lease; second, that the plaintiff, who was himself a lessee, had no title to grant the lease intended, and that the defendant, before entry and before commencement of the intended term, avoided the lease on that ground.

The question which arises on the first defence set up is, whether the lease which was signed is a lease not exceeding three years. If it is a lease not exceeding three years, then no writing was necessary to make it valid, and the statute does not apply. But if it exceeded three years, then it is not within the 2d section of the Statute of Frauds, a writing was necessary under the 1st section, and a deed is now necessary.

We have, therefore, to construe the lease in question. No *authority was cited to us upon this part of the case, [320 and we are aware of none from which we can derive much assistance. The conclusion, however, we have arrived at is that we cannot consider this as a lease not exceeding three years. A lease not exceeding three years, in our opinion, must be a lease not giving a right (independent of the lessor) exceeding three years. We think a demise for three years, and for three years longer, at the option of the lessee, could not be said to be a lease not exceeding three years, and would not be valid if by parol only.

It is true that in the present case the lease is not in the above terms, but the tenant acquires under it a right at his

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own option by a month's notice to continue it on. If that is given the tenant still holds under the original demise—there is no further act of the lessor.

The question decided in the present case appears to be a technical one, viz., that a deed is necessary where there is a writing. But we are bound to give effect to the objection, because we are in effect deciding to what extent a lease by parol only is binding, a question affecting the title to property to a considerable extent.

The case of *Crosby v. Wadsworth* (1) is so different from the present that it cannot be referred to as an authority; but Lord Ellenborough's language, in speaking of the 1st and 2d sections of the Statute of Frauds, is deserving of notice. He says (p. 610): "The leases, &c., meant to be vacated by the 1st section must be understood as leases of the like kind with those in the 2d, but which conveyed a larger interest to the party than for a term of three years." In the present case a larger interest was conveyed than for a term of three years.

The above conclusion makes it unnecessary to consider the other question, because, in our opinion, the foundation of the plaintiff's claim for rent fails, and there must be judgment for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Gregory, Rowcliffes & Rawle*, for Manby, Wolverhampton.

Solicitors for defendant: *Pickett & Mytton*, for T. W. Hall, Bilston.

(1) 6 East, 602.

A lease to commence in future passes a present interest in the term to the lessee: *Whitney v. Allaire*, 1 N. Y., 805; *Trull v. Granger*, 8 N. Y., 115; *Becar v. Flues*, 64 N. Y., 518.

See *Wood v. Hubbell*, 5 Barb., 601, affirmed 10 N. Y., 479; *McKechnie v. Sterling*, 48 Barb., 835; *Lafarge v. Mansfield*, 31 Barb., 845.

A lease for one year, and for three additional years if the lessee elect, is of itself a lease for four years, if the lessee elect to continue it beyond the first year: *House v. Burr*, 24 Barb., 525; *Chriddenden v. Doney*, 1 N. Y., 419; *Orton v. Noonan*, 27 Wisc., 272, Id., 300; *Paulet v. Cook*, 44 N. H., 512.

Though if not for a specified number of additional years, it is terminated by the death of the lessor: *Western, etc., v. Lansing*, 49 N. Y., 499.

See as to covenant to renew: *Tracy v. Albany Exchange Co.*, 7 N. Y., 472-4; *Dunnell v. Kittletas*, 16 Abb. Pr. Rep., 205; *Western, etc., v. Lansing*, 49 N. Y., 499, 504-9.

But if a firm have an option to continue, one of the firm cannot bind partners who have retired, by electing to continue: *James v. Pope*, 19 N. Y., 324.

Though an assignee, with the lessor's assent, may give the notice and retain the premises under the lease: *Wilkinson v. Petit*, 47 Barb., 230.

And when the day on which the term is to commence arrives, the lessee has the right of possession and to maintain ejectment against a stranger wrongfully withholding the demised premises: *Trull v. Granger*, 8 N. Y., 115; *Becar v. Flues*, 64 N. Y., 520.

See *Conger v. Weaver*, 20 N. Y., 146; *Wood v. Hubbell*, 10 id., 479.

As to what is a lease and what an agreement for one: *Averill v. Tyler*, 8 N. Y., 44; *Mack v. Patchin*, 29 How. Pr., 20, affirmed 42 N. Y., 167; *Tidey v. Mollett*, 16 C. B., N.S., 298 (111 Eng. C. L. Rep.), overruling *Stratton v. Pettitt*, 16 C. B., 420 (81 Eng. C. L. Rep.); *Hayne v. Cummings*, 16 C. B., N.S., 421 (111 Eng. C. L. Rep.); *Lafarge v. Mansfield*, 81 Barbour, 845; *Grant v.*

Lynch, 6 U. C. Com. Pl., 178; *People v. Kelsey*, 14 Abb. Pr., 372; *Griffin v. Kinsely*, 75 Ills., 411; *Stubbs v. Broddy*, 27 U. C. Com. Pl., 284; *Hall v. Hall*, 15 U. C. Q. B., 637.

In New York a parol lease of lands for the term of one year, to commence at a period subsequent to the day when the contract is made, is valid under the statute of that state: *Young v. Dake*, 5 N. Y., 463; disapproving *Croswell v. Crane*, 7 Barb., 192.

C A S E S
DETERMINED BY THE
PROBATE DIVORCE AND ADMIRALTY DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THAT DIVISION
AND BY THE
ECCLESIASTICAL COURTS,
X L V I C T O R I A .

[2 Probate Division, 29.]

Dec. 20, 1876.

[IN THE COURT OF APPEAL.]

29]

. *THE VIVAR. (O. 443.)

Practice—Jurisdiction—Admiralty Action in personam—The Judicature Act, 1875 (38 & 39 Vict. 77), s. 18—Rules of Supreme Court, Order XI, Rule 1—Appearance under Protest.

A collision took place at sea, about ten miles from the South Stack Light House, between an American and a Spanish vessel. Both vessels sunk in consequence of the collision, and the owners of the American vessel applied in the registry for leave to issue a writ for service out of the jurisdiction in an action to recover compensation for the loss of their vessel, against a British subject resident in Spain, who was alleged to be one of the owners of the Spanish vessel. The Registrar having granted the necessary leave, the writ was issued and service was effected on the defendant in Spain. Thereupon an appearance under protest was entered on his behalf. Afterwards, on these facts being brought before the judge of the Admiralty Court, on motion, the court ordered the action to be dismissed:

Held, on appeal, that the order was right.

A defendant in an admiralty action desiring to object to the jurisdiction of the

court, may enter an appearance under protest, in accordance with the practice in force in the High Court of Admiralty before the coming into operation of the Judicature Acts.

In re Smith (1 P. D., 800) followed ⁽¹⁾.

⁽¹⁾ See *Harris v. Hamburg-Amerikanische Packetfahrt-Actien-Gesellschaft*, C. P. D., Jan. 13, 1877, not yet reported.

[2 Probate Division, 34.]

Nov. 24, 1876.

*THE PLADDA. (F. 27.)

[34

Damage—Collision between Vessel moored and Vessel driven from her Moorings by third Vessel—Duty of Vessel lying at Moorings during a Gale to have Chains bent and Look-out on Deck.

During a very violent gale a brig adrift in the Tyne drove down on a steamer which was lying properly moored to mooring buoys placed there by the harbor authorities. On the brig striking the steamer the ring of one of the buoys carried away, and the steamer got adrift, and drove down the river, and ultimately came in contact with and did damage to a bark, whose owners instituted a cause of damage against the steamer in the county court of Northumberland, to recover for the damage done to their vessel by the steamer.

At the hearing it was proved that the chain cables of the steamer had been unbent at the time she got adrift, and that no look-out had previously been kept on deck, though it was known that the weather was getting worse:

Held, on appeal, affirming the decision of the court below, that a defence of inevitable accident, set up by the owners of the steamer, was not sustained, and that the steamer was alone to blame for the collision.

THIS was an appeal from the county court of Northumberland, holden at Newcastle-upon-Tyne, in a cause of damage instituted *on behalf of the owners of the bark [35 Ocean against the steamer Pladda, to recover damages in respect of a collision between the two vessels in the Tyne, on the 20th of January, 1875, during a very violent gale, when the Pladda, which had been lying off Wellington Quay, moored to buoys placed there by the Tyne commissioners, having been run into by a brig adrift in the river, got adrift from her moorings, owing to the ring of one of the buoys having carried away, and came into collision with and damaged the bark Ocean, as that vessel was lying on the ground alongside Young's Dock Quay. The result of the evidence and the nature of the decree appealed from appears from the judgment of this court, and the judgment of the learned judge of the court below (Thomas Bradshaw, Esq.), delivered by him on the 17th of December, 1875, in the following terms:—

THOMAS BRADSHAW, ESQ.: The question to be decided in this case—which undoubtedly on the face of it presents itself as a case of inevitable accident—is whether there are any circumstances showing negligence on the part of the master of the Pladda or any of his officers which would prevent the conclusion of

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inevitable accident from being arrived at. We have it in evidence that the Pladda was lying off Clelland's Yard in the Tyne, moored between the Fusilier and the Hugh Taylor, in a proper way and with all due precautions, to the River Tyne commissioners' buoys—and, so far as the Pladda was concerned; she was lying there with the intention of going on to Clelland's slipway for some repairs, and it is in evidence that she would have been taken on the slipway the day before the collision happened, but that she was not sufficiently light forward by two or three inches. She had in the meantime been lightened by removing everything that could be removed, even to her cables, to the after part of the ship, and her position was such at that time that if the wind had not increased during the night of the 20th Mr. Clelland would have taken her on to the slipway that night at one o'clock. Mr. Clelland's foreman said in evidence, "I intended taking her on to the slip at one o'clock that night if there had not been a gale." The vessel thus being moored and waiting for her summons to go on to the slipway, the captain and all the crew went below. I believe they went below at ten o'clock. We know nothing of what happened from that hour till twelve o'clock. At twelve o'clock the mate came on deck, and on looking about and finding nothing to make him apprehensive about any mischief to the ship from the state of things that he saw, he went below again. There was no anchor watch, and nothing turns on this, because the ship was moored in the river and not anchored. There was no watchman on deck, and I think something will turn upon this. About three o'clock the mate came up again, and found that the wind was blowing then nearly a hurricane, and about the same time, on hearing voices on deck, as he tells us, the captain came on deck. All the hands were then ordered on deck. It was endeavored to get out a rope to the Hugh Taylor as a means of precaution. It was at this time that a brig was seen 36] drifting or driving down upon the tier in which the *Pladda, Hugh Taylor, and the Fusilier lay, and this vessel did then, in fact, drive into them with such violence that, with the force of the blow, aggravated probably by the violence of the wind at that time, the moorings of all those vessels broke, and they were carried away. There was then an endeavor to get out a cable and bend it on to the anchor—the cable as we have seen had been carried aft—but the cable fouled. Being thus adrift from her moorings in the river, with the gale as described, the Pladda, after various vicissitudes, was driven into the bark Ocean, and did the damage complained of in this action, which is to be assessed by the consent of both parties at £300. The question for me is, ought I, under these circumstances, to say that the owners of the Pladda are liable for this injury? The true rule of law is laid down by the Privy Council in *The William Lindsay* ⁽¹⁾, and it is shortly this: that the master "must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avoid danger in the circumstances in which he may happen to be placed." Now, looking to the position of this ship, to the circumstances which surrounded her, to the object she had in view of being taken on to the slipway, did she do that which was reasonable for her to do at that time? Did her captain and officers do that which they ought to have done? If I were left to my own unaided judgment, I should be inclined to say that the captain and officers had sufficiently and substantially done their duty in the circumstances in which they were placed. But I was pressed very much by some observations which were made by the judge of the High Court of Admiralty in the recent case of *The Kepler* ⁽²⁾, and it is a curious fact that the circumstances connected with the injury deposed to in that suit happened on the Tyne on this very night of the 20th of January, 1875. There are two things which have been pressed very much upon me as bearing upon negligence, and one is that there was no watchman. I have already said that I do not think an anchor watch was necessary, as the ship was moored in harbor. I think that, up to twelve o'clock, when the mate came on deck, everything was done that was necessary to be done under the circumstances, and that up to that time there was no negligence whatever. I think the negligence began then, and I think there was negligence on the part

⁽¹⁾ Law Rep., 5 P. C., 338.

⁽²⁾ See note at end of case, p. 40.

of the mate at that time. The gale was then rising, although it had not arrived at the hurricane. The hurricane arrived at three o'clock, and the mate ought, in my opinion, if he had thought fit to go down into his cabin again, to have set a watch on deck to have aroused him, and perhaps the captain, the moment any change occurred, and if in any case it might become necessary to take further steps; or he should have at once gone and called the captain, and asked, "What do you think of it? there is a gale rising, and you can see what the state of the barometer is?" And now I come to the opinion of Sir Robert Phillimore pronounced in the case to which I have adverted, to which it is my plain duty to defer. "In the first place," he says, "they"—the Elder Brethren of the Trinity House—"are of opinion that this vessel—the Kepler—was not properly moored." I cannot say that here, for I think the Pladda was properly moored, "and certainly she ought to have retained the means of letting go her anchor and have had a chain ready to veer." I think these words are applicable to this case. The Pladda should have had her cable attached to her anchor, so as to be able to let it go when an emergency arose. Sir Robert Phillimore further says: [37] "There was warning from the falling of the barometer and the gale of the day before." And the only observation I make upon that is that, in reply to a question, the captain said he did not look at the barometer although the wind was rising. I am therefore bound to find that there was a want of that ordinary foresight and prudence which was required under the circumstances, and I pronounce that the Pladda is alone to blame. My judgment is for the plaintiffs. The Ocean will take its £300, the amount of the damage agreed upon. I think it proper to add that the assessor who has sat with me entirely concurs in my judgment.

Against the decree made in pursuance of this judgment the owners of the Pladda appealed to this court.

The appeal came on to be heard before the judge, assisted by two of the Elder Brethren of the Trinity corporation.

Butt, Q.C., and *G. Bruce*, appeared on behalf of the appellants: The real question is not whether the collision with the Ocean could, by any possibility, have been avoided, but whether the master of the Pladda, previously to the accident, did not exercise all the care, skill, and diligence, which could have been expected from a reasonable man: *The William Lindsay* ⁽¹⁾; *The Marpesia* ⁽²⁾. The case of *The Kepler* ⁽³⁾ is not in point, as in that case the Kepler was held to be improperly moored, whilst here the moorings were amply sufficient. The circumstances in the present case are more similar to those in the case of *The Ambassador* ⁽⁴⁾, where a plea of inevitable accident was sustained in favor of a vessel driven from her moorings in the Thames, although no attempt to anchor had been made. The master of the Pladda was not bound to take precautions against a gale of extraordinary severity, or against an accident entirely caused by another vessel's default. It was necessary that the Pladda should go on to the slipway, and this could not be done unless she was lightened forward and her chains had been unbent from her anchors.

⁽¹⁾ Law Rep., 5 P. C., 338.

⁽²⁾ Law Rep., 4 P. C., 212.

⁽³⁾ See note at end of case, p. 40.

⁽⁴⁾ Admiralty Court, Feb. 12, 1875, not reported.

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E. C. Clarkson, appeared on behalf of the respondents: The proper precautions required in the circumstances were not taken on board the *Pladda*. It was apparent that the weather was getting worse, and the master of the *Pladda* 38] ought to have seen *that a look-out was kept on deck, and that the chains of the anchors were re-bent, so as to be available when the *Pladda* got adrift. The collision in the case of *The Ambassador* ⁽¹⁾ took place in calm weather, when it was contrary to expectation that any accident could happen.

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE: This is an appeal from the decision of the judge of the county court of Northumberland, holden at Newcastle, he being assisted by a nautical assessor. By their decision the *Pladda* was found to blame for this collision.

The *Pladda* was a vessel which, on the 20th of January, 1875, was moored properly at a proper mooring-place in the river Tyne, and had been waiting some time to get on a slip for the purpose of being repaired; and those who had command of her thought it necessary, in order to her doing so, to cause the chains of her anchors to be brought aft, the anchors being left on the fore part of the vessel. The *Pladda*, being so moored, was run into by a brig whose name does not appear, but which seems to have dashed against the whole tier of vessels on each side of the *Pladda* and set them all adrift, and the *Pladda*, after traversing a certain space, and after the lapse of a certain time, was driven into collision with the *Ocean*, whose owners are the respondents in this case and were the plaintiffs in the court below. Now, I have carefully considered the case and the law applicable to it, which is laid down by Dr. Lushington in *The Virgil* ⁽²⁾, cited in *The Marpesia* ⁽³⁾. In the former case Dr. Lushington said:—

In my apprehension an inevitable accident in point of law is this, namely, that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution, that would have rendered the accident less probable.

Not that would have prevented the accident occurring if it of necessity must have occurred, but that would have ren- 39] dered it **“less probable.”* In the present case the

⁽¹⁾ Admiralty Court, Feb. 12, 1875, not reported.

⁽²⁾ 2 W. Rob., 201.

⁽³⁾ Law Rep., 4 P. C., 212.

judge of the court below held the Pladda to blame on the facts which I will shortly state. It appears that the Pladda being moored in the way which I have described before she got adrift as I have stated, had no anchor watch on board; but at midnight the mate came on deck, or looked upon the deck, and saw that the weather was becoming worse. I will read it in his own words: he says, "I was only out once before midnight. It blew pretty strong then." He is asked whether he thought there was anything to make him fear the Pladda would not remain at her moorings, and he said, "Well, not at that time; I don't think at that time." It is indisputable that he saw a change in the weather had taken place; he knew that the cables had been unchained from the anchors and were unavailable, nevertheless, he thought it his duty to go below without summoning the master, or consulting the other officers, or setting any watch or seaman to look out, notwithstanding that he saw that the weather was getting worse, in the event of other precautions being necessary. He comes up at three o'clock, and then he finds it necessary to give orders to put out another rope as well as to get a chain bent to one of the anchors. I have consulted the Elder Brethren of the Trinity House on the different questions involved, and I have told them the law with respect to the amount of care, caution, and skill that is required, in order to establish the defence of inevitable accident, and I will state the conclusion at which we have arrived. First, we are of opinion that originally the chains were improperly unbent, and that the weight of that part of the cable attached to the anchor would have made no perceptible difference with respect to getting the vessel on the slipway; secondly, we are of opinion that, knowing the state of the weather, the cables should have been rebent; thirdly, that when the mate was on deck he was very much to blame for not reporting the weather and causing a look-out to be kept on deck; and, fourthly, we are of opinion that, had an anchor been let go, the collision would probably have been averted, at all events, the master would have done all that was possible in the circumstances, and have rendered the accident, to use the words of Dr. Lushington, "less probable." *On these grounds I decide [40 that the judgment of the court below should be affirmed, and I dismiss the respondents with costs.

Solicitor for appellants: *Cooper*.

Solicitors for respondents: *Stokes, Saunders & Stokes*.

1875

The Kepler.

July 22, 1875.

[In the Court of Admiralty.]

THE KEPLER. (7182.)

THIS was a cause of damage instituted on the behalf of the owners of the brig Carbonaria against the steamship Kepler, and against her owners, and their bail intervening as defendants.

The petition alleged that early on the morning of the 20th of January, 1875, the Carbonaria, when securely moored to the buoys off Pott's Wharf, in the river Tyne, was run into by the Kepler, which, before and at the time of the collision, had neither her master nor any of her crew on board her; that the Kepler had been improperly left without any responsible person on board her, contrary to the by-laws of the river Tyne; and that she had been improperly and insecurely moored.

The answer set up the defence of inevitable accident, alleging that the Kepler had been securely moored, that her moorings had parted from the violence of the gale, that a watchman, a fireman, and her steward had been on board her when she had broken adrift; but the fireman had, in endeavoring to make a rope fast to another vessel, been left on board such other vessel, whilst the watchman and steward, after endeavoring to let go an anchor, had jumped on board a vessel to save their lives.

The cause now came on for hearing, before the judge, assisted by two of the Elder Brethren of the Trinity corporation.

Butt, Q.C., and H. Stokes, for the plaintiffs.

Milward, Q.C., and E. C. Clarkson, for the defendants.

The result of the evidence appears from the judgment.

SIR ROBERT PHILLIMORE: In this case the Carbonaria was properly and securely moored off Pott's Wharf in the river Tyne, and on the 20th of January in this year, there blew a considerable gale; one of the consequences of which was that a vessel called the Kepler, an iron screw steamship, drove down athwart the bows of the Carbonaria, and did her considerable damage. The owners of the Carbonaria bring their action in this court against the Kepler, and the only defence set up by the Kepler is, that the collision was occasioned by inevitable accident. It is the duty of those who set up the defence to sustain it by adequate evidence; and after listening to all the testimony which has been produced before us, we are of opinion that the defence is not adequately made out. It is a case in which, no doubt, my own judgment has been greatly strengthened by 41] the *opinion of the Elder Brethren of the Trinity House, because it involves, to a great extent at least, if not entirely, matters upon which their skill and experience peculiarly qualify them to decide. In the first place, they are of opinion that this vessel, the Kepler, was not properly moored, and certainly she ought to have retained the means of letting go her anchor, and have had a chain ready to veer. There was warning from the falling of the barometer and the gale of the day before; and the place in which she was anchored was such as to require every precaution. We are, moreover, of opinion that the master ought to have been on board himself, and not on shore, and more of the crew ought to have been on board, in order to enable them to take every precaution necessary, if they found that the anchor might have been dropped and other measures taken. And it appears that, though a vessel was in juxtaposition to her, she would, if she had been properly moored, have lain in perfect security from being driven from her moorings by the other vessel driving up. On the whole, we are of opinion that the evidence does not establish that the collision was entirely the result of inevitable accident, but that it was occasioned in a great measure by negligence on the part of the master and crew of the Kepler. I therefore pronounce the Kepler alone to blame.

Solicitors for plaintiffs: *Stokes, Saunders & Stokes.*

Solicitor for defendants: *Cooper.*

[2 Probate Division, 41.]

Dec. 5, 1876.

THE ROSARIO. (B. 341.)

Distribution of Salvage—Assignment of Shares of Salvage-money previously earned—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 182—Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 18.

A cause of distribution of salvage was instituted on behalf of some of the crew of a steamship against the owners of the steamship. The owners of the steamship appeared to defend the suit, and in their statement of defence, alleged in effect that, subsequently to the salvage services, but before any amount had been paid in respect of such services, fourteen of the plaintiffs had by deed, in consideration of sums varying from £1 to 10s. paid them by the defendants, assigned to the defendants all their respective shares of salvage reward. The plaintiffs demurred to the paragraphs of the statement of defence containing these allegations.

The court sustained the demurrer.

THIS was a cause of distribution of salvage instituted on behalf of sixteen of the crew of the steamship Navarino against Thomas Wilson, Sons & Co., the owners of the said steamship.

The statement of claim alleged that the Navarino, on the morning of the 22d of March, 1875, when on a voyage from Glasgow to Bombay, and manned with a crew of sixty-two hands, including *the plaintiffs, had rendered salvage [42 services to the steamship Rosario, by towing her in a state of distress the distance of eighty-six miles into the port of Gibraltar. That for the services so rendered the owners of the Rosario and her cargo had paid to the defendants the sum of £750, which amount had been accepted by the defendants; but the defendants, though requested to do so, had refused to pay the plaintiffs their equitable portion of the said sum.

The solicitors for the defendants delivered a statement of defence, which, after admitting that the Navarino had towed the Rosario to Gibraltar, as mentioned in the statement of claim, and alleging that the service had been rendered without any danger to the plaintiffs and mainly by the steam-power of the Navarino, further alleged, in the 4th paragraph, substantially as follows :

4. That the crew of the Navarino having made frequent applications to the defendants for the payment of their shares of the salvage in respect of the said services, and constantly importuning the defendants in respect thereof, although the defendants had not received any amount in respect of such salvage, and had not agreed with the owners of the Rosario as to the amount to be received, the defendants determined to purchase their respective shares of the salvage from such of the crew as wished for an immediate payment, and accordingly, by an indenture dated the 11th day of June, 1875, between the several persons whose names are thereunto described, and seals are affixed, of the one part, and the

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The Rosario.

defendants, of the other part, the said several persons parties thereto, of the first part, including all the plaintiffs, except George Short and Robert Burns, in consideration of the respective sums set opposite to their respective names in the fourth column of the schedule, paid by the defendants to the said parties of the first part, each of the said parties of the first part assigned to the defendants all and every the share, right, title, and interest of the said parties of the first part in the salvage or salvage reward and remuneration then due, or thereafter to be due or paid or awarded in respect of the salvage services set forth in the statement of claim, with power for the defendants to sue for, receive, and give receipts for the salvage, and to use the names of the said parties of the first part.

5. The sums so paid to the said plaintiffs other than George Short and Robert Burns ⁽¹⁾ were as follows :

[Here followed a schedule of the names of all the plaintiffs in question ; there being printed opposite each name the sum paid in each case under the provisions of the agreement referred to in the preceding paragraph. The amount of the sum so printed was either £1 or 10s.]

3. The plaintiffs demurred to the 4th and 5th paragraphs of the statement of defence, and alleged as the ground of 43] the demurrer *that the agreement therein set out was void and inoperative under the provisions of the Merchant Shipping Act, 1854.

Nov. 30. *J. P. Aspinall*, on behalf of the plaintiffs, in support of the demurrer: The agreement referred to is not only an agreement which, under the old law, would have been set aside as inequitable at the hearing, but is now absolutely void under the express provisions of the 182d section of the Merchant Shipping Act, 1854. It is clear, not only from the very words of that section but from the light thrown on its construction by a consideration of the 18th section of the Merchant Shipping Amendment Act, 1862, that the Legislature intended to prohibit the assignment not only of salvage about to be earned, but of salvage already earned.

E. C. Clarkson, on behalf of the defendants: The 182d section of the Merchant Shipping Act, 1854, is directed against the abandonment of a right to salvage remuneration for services to be performed at a future period, and not against an assignment for valuable consideration of a right to share the salvage reward due in respect of services, already performed, and the character of which is known to the salvors. The question whether the consideration expressed in the assignment is adequate or inadequate can only be determined by the court when all the circumstances of the case are before it at the hearing. All other choses in action can be assigned. Why should a right to recover salvage be alone excepted ?

Cur. adv. vult.

⁽¹⁾ In a subsequent paragraph of the statement of defence a tender to each of these two plaintiffs of the sum of £4 was pleaded.

Dec. 5. SIR ROBERT PHILLIMORE: This is a cause of distribution of salvage, in the course of which a question on demurrer has arisen. The plaintiffs are sixteen of the crew, and the defendants the owners of the salving vessel. In the 4th paragraph of the statement of defence it is stated as follows: [His Lordship here read the 4th paragraph of the statement of defence as above set out.] Then the next paragraph sets out the names of the crew, and the sums, opposite to their names, which they have received by way of purchase for the assignment of their right to salvage. The sums vary from £1 to 10s. Now, these two paragraphs have been demurred to on the ground that the agreement mentioned in the 4th paragraph of the statement of defence is wholly void and inoperative *under the 182d section [44 of the Merchant Shipping Act, 1854, and that the plaintiffs have not abandoned any right to recover from the defendants their due, equitable, and reasonable proportion of salvage reward. This demurrer has been argued before the court, and well argued on both sides. The question for the court to decide is whether, under the statute referred to, this assignment of the right to share in salvage was or was not valid. The words of the Merchant Shipping Act of 1854, s. 182, are as follows: “. . . Every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative.” It is contended that this section is not applicable to the present case, or to this deed of assignment, because it is said, and has been argued, that it is not a stipulation by which the parties consented to abandon any future rights they might have in the nature of salvage, but merely an assignment for a valuable consideration; but in construing the act I must look not only to the words but to the general purpose of the act, which is well stated in *The Pride of Canada* (1) by Dr. Lushington, in the 1st Maritime Law Cases, where he says:—

The ancient law of the court in questions of this kind was undoubted—viz., that whenever any sum had been allotted by way of salvage, it was competent to any party dissatisfied with the distribution by the owners or master to apply to this court for an apportionment of that sum of money; and so jealous was the law that no man should be deprived of his fair share of this reward, that even before the passing of the act of Parliament . . . it was a general doctrine of this court that no seaman could enter into a stipulation of an inequitable nature; and giving up his salvage would so have been deemed according to all the authorities and principles laid down by Lord Stowell and every other judge, upon the subject. . . .

(1) Br. & Lush. Adm., 203; 1 Mar. Law Cases, 406.

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The Cynthia.

My learned predecessor then proceeds to advert to the subsequent statute, the Merchant Shipping Amendment Act of 1862 (25 & 26 Vict. c. 63), s. 18. It is not necessary that I should consider the force of that section, for it is clearly inapplicable to the present case, being applicable only to salvors who have gone on board ships on terms of agreement to be employed for salvage service. It is, however, not altogether without bearing upon the case to refer to 27 & 28 45] Vict. c. 24, s. 15, by which under the *heading "distribution of salvage, bounty, prize, and other money," it is enacted that,

Any assignment, sale, or contract of or relating to any such money as aforesaid, payable in respect of the services of any petty officer or seaman, non-commissioned officer of marines, or marine, other than such as may be made or entered into under the authority of and in conformity with any such order in council, shall be void.

The Legislature, in the 182d section of the Merchant Shipping Act, 1854, to which I have already adverted, and which, in my opinion, is applicable to the present case, could not have intended to provide merely against the abandonment, without any valuable consideration whatever, of a right to share in salvage; but it must have intended, looking to the general purpose of the act, to protect seamen in the assignment of their rights before and after salvage service had been rendered. The section of the statute is in aid of the general law, and not as a substitute for it. I think the demurrer must be sustained, and that the plaintiffs are entitled to costs. I grant leave to amend.

Solicitor for plaintiffs: *Coote*.

Solicitors for defendants: *Pritchard & Sons*.

[2 Probate Division, 52.]

Nov. 28, 1876.

52] *THE CYNTHIA. (H. 293.)

Collision—Control of Dock-master—Harbors, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27), s. 52—Negligence of Master of Vessel entering Dock.

The steamer C., coming into the St. Katharine's Docks, fell against two barges, and drove them against a vessel called the V., which was lying alongside the St. Katharine's Wharf; a skiff was between the V. and the wharf, and in such a position as not to be visible to those on board the C. By reason of the C. falling against the barges the V. was driven towards the wharf, and crushed the skiff against the wharf. At the time of the collision the C. was within the prescribed limits within which the jurisdiction of the dock-master extended, and she was coming into dock under the direction of the dock-master. A cause of damage was instituted in the City of London Court on behalf of the owner of the skiff and the owners of her cargo against the owners of the C. to recover for the damage done to the skiff and her cargo :

Held, on appeal (reversing the judgment of the court below), that the accident might have been avoided if the master of the C. had taken proper precautions in entering the dock, and that the C. must be condemned in the damage proceeded for.

THIS was an appeal from a decree of the City of London Court in an action of collision, instituted on behalf of the owner of the skiff Emily and the owners of her cargo against the steamship Cynthia.

The evidence given in the City of London Court was in substance as follows:—

At the time the collision occurred, the Cynthia was entering the St. Katharine's Docks under her own steam, having a Trinity pilot on board, and she was within the prescribed limits within the meaning of the 52d section of the Harbors, Docks, and Piers Clauses Act. A steamer called the Vigilant was lying alongside the St. Katharine's Wharf close to the entrance of the dock. Outside the Vigilant two barges were lying, and inside, between the Vigilant and the wharf, the Emily was lying; she was in such a position as not to be visible to those on board the Cynthia. The dock-master was on the pier-head giving orders to vessels coming in and going out of dock. The Cynthia was allowed to fall against the barges in such a manner as to force the Vigilant against the skiff, and to cause the Vigilant to crush the skiff against the wharf.

According to the witnesses for the defendants, the Cynthia had been swung by means of a rope from the pier-head, and after she had been swung, the rope was cast off, and the Cynthia was allowed to drop clear, and the tide carried her against the barges.

On behalf of the plaintiff it was contended that the Cynthia *ought to have had a tug to hold her, or she ought [53 to have had a check rope made fast to one of the warping buoys in the river, called the Middle buoy.

The pilot of the Cynthia gave evidence for the defendants as follows:—

From the time I got the Cynthia within the prescribed limits I gave no orders except the orders given by the dock-master, and all those orders were obeyed. By the orders of the dock-master the Cynthia was allowed to drop with the tide. The dock-master gave no orders with respect to the barges. I pointed in that way to him as much as to say "the barges." He said, "All right, let her come."

The dock-master was called as a witness for the defendants, and he said:—

It is not usual for a vessel the size of the Cynthia to take a tug. I gave all the necessary orders to bring the Cynthia properly into dock. If the Cynthia had had a warp out to the Middle buoy I should have given orders to let it go. I gave no orders to prevent the Cynthia falling alongside the barges. I did not see the skiff.

The learned judge of the City of London Court (Mr. Commissioner Kerr) decreed that judgment with costs should be entered for the defendants. The owners of the Emily and her cargo appealed to this court.

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The Cynthia.

Nov. 25. On this day the appeal was heard before the judge, assisted by two of the Elder Brethren of the Trinity Corporation.

It appeared by the proceedings in the court below, filed in the registry for the purposes of the appeal, that the learned judge of the court below, in the course of the hearing before him had made the following observations:—

MR. COMMISSIONER KERR: *Prima facie* it was the duty of the people on board the Cynthia to have seen the position of the Emily, but at the time of the accident the Cynthia was under the control of the dock authorities. If the dock authorities had been defendants in the action, I should have made them responsible; but I cannot find that there is evidence of any act of negligence on the part of the Cynthia. She acted entirely in obedience to the orders that came from the dock-master. Here there is a statutory authority vested in the dock authorities to exercise an exclusive control within the prescribed limits. It has never been decided that it is in the power of any master or pilot to supersede the dock-master's orders if he thinks the dock-master is going wrong.

I find, as facts, that there was no order given with a view to keep the Cynthia away from the barges, and that the Emily was lying in a proper place. I cannot find as a fact that the Cynthia knew of the existence of the Emily, nor can I go into the question whether the Cynthia could have been kept off the barges 54] if the *dock-master had not required her to be got into the dock. I am of opinion that if the dock-master had been aware of the existence of the skiff he must have lost the tide rather than smash the skiff. I find as a fact that the dock authorities did not know that the skiff was in the position in which she was; in my opinion they might and ought to have known it. This finding, however, does not help the plaintiffs, as the action has not been brought against the dock authorities.

R. E. Webster and *W. G. F. Phillimore*, appeared for the appellants, the owners of the Emily and her cargo: No accident would have happened to the Emily if the master of the Cynthia had taken the ordinary precaution of putting out a rope to check the stern of the Cynthia from swinging against the barges. Such a precaution the master of the Cynthia was bound to take, and his owners must be answerable for the consequences of his neglect. It is true that the dock-master had given orders for the Cynthia to go into dock, but s. 52 of the Harbors, Docks, and Piers Clauses Act, 1847, only gives the harbor authorities jurisdiction to regulate the time and mode of entering and leaving the dock, and does not free the owners of a vessel ordered to enter from liability in a case where, as here, the master of such vessel, whilst obeying the orders given, has been guilty of contributory negligence. This was virtually decided by this court in the case of *The Belgic* (1). The case of *The Bilbao* (2) will be relied on on the other side, but there the only question was, whether the collision had been brought about solely by the fault of the dock-master. The rule

(1) See note at end of case, p. 57.

(2) Lush. Adm., 149.

laid down by the Judicial Committee of the Privy Council in the case of *The Lona* ⁽¹⁾ with respect to the duty of the master and crew of a vessel under the control of a pilot compulsorily in charge is equally the governing rule applicable in cases where the master of a vessel has negligently obeyed the orders of a dock-master, in entering dock without proper precautions.

Milward, Q.C., and *G. Bruce*, for the respondents, the owners of the *Cynthia*: The *Cynthia* at and previous to the collision was within the limits prescribed by the St. Katharine's Docks Act, 1864, that is, within 100 yards of the entrance of the dock (see the London and St. Katharine's Docks Act, 1864, 27 & 28 Vict. c. clxxxviii, ss. 62, 92, and sched. 4, pt. ii (6 Geo. 4, c. cv, s. 100)); she was, therefore, as a vessel going into dock, under the sole control of the dock-master for all purposes of navigation, and her *master [55 and crew were accordingly bound implicitly to obey his orders: *The Bilbao* ⁽²⁾; *The Excelsior* ⁽³⁾. It was not the duty of the master of the *Cynthia* to interfere with the discretion of the dock-master as to what precautions should be taken in entering the dock, and if he had done so and damage had ensued he would have been held liable: *The Broeder Trow* ⁽⁴⁾. Moreover, the *Cynthia* had a *prima facie* right to enter the dock, and the only duty which in any circumstances could have been cast upon her master would have been to keep clear of such vessels as were visible. The position of the *Emily* was unknown to him. The case of *The Belgic* ⁽⁵⁾ really affords no guide to a decision in this case, for in that case no order was given to the master by the dock-master at all, but the collision was really brought about by an act for which the master was entirely responsible. The rules laid down with regard to contributory negligence in cases of compulsory pilotage can have little or no bearing where express control over a vessel is given by statute to a public officer.

Webster, in reply.

Cur. adv. vult.

Nov. 28. SIR ROBERT PHILLIMORE: This is an appeal from the City of London Court. A small skiff, the *Emily*, was lying underneath a crane on the St. Katharine's Wharf in the River Thames, taking in goods, and outside of her lay a steamer called the *Vigilant*. Outside the *Vigilant* lay two barges. A steamer called the *Cynthia* coming into the

⁽¹⁾ Law Rep., 1 P. C., 426, 432.

⁽²⁾ Lush. Adm., 149.

⁽³⁾ Law Rep., 2 A. & E., 268.

20 ENG. REP.

⁽⁴⁾ 17 Jur., 94.

⁽⁵⁾ See note at end of case, p. 57.

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The Cynthia.

St. Katharine's Dock, fell with her port side against the barges, drove the barges into the Vigilant, breaking her bobstay and figure-head, and also driving the Vigilant into the skiff, to which she did considerable damage.

The learned judge found as a fact that the skiff was in no way to blame, and had a right to recover against the dock company, but not against the Cynthia, against whom the action was brought. In his opinion the Cynthia was bound by the statutes, to which I will presently refer, strictly to obey the orders of the dock-master, and to take no measures except those which he prescribed. Those orders brought about the collision, and therefore the Cynthia was not to 56] blame; and he dismissed her from the *suit. There are two points raised for my consideration. First, was the Cynthia guilty of negligence which caused the collision with the skiff? Secondly, was she relieved from responsibility by being under the sole control of the dock company, whose orders she obeyed.

As to the first point, I have conferred with the Trinity Masters, and will state their opinion, in which I agree, to this effect:—

The Cynthia ought to have had a rope passed to the Middle buoy, to have been used if necessary. If she was found to be swinging on the barges, the rope would have enabled her to keep her quarter off the barges. She was dropping up with the tide and swinging alongside of the barges.

The pilot saw that she would come into collision with the barges, and pointed it out to the dock-master. The pilot had no right to calculate on touching the barges so lightly as not to cause damage to them or to the vessels on the other side.

With respect to the position of the skiff, we think that she was not in an improper place, but in the exercise of her clear right in lying where she was.

As to the contention that if a rope had then been there the Cynthia could not have got in that tide, in the first place, that would not justify her in doing damage to another vessel; in the second place, the Trinity Masters are of a wholly different opinion, thinking, on the contrary, that the rope would have assisted the Cynthia to go in without squeezing or damaging any other vessel.

As to the second point, the 10 Vict. c. 27, s. 52, and the local act of the St. Katharine's Docks are relied upon by the respondents. The latter act extends the distance within which the harbor-master's authority can be exercised to a hundred yards. The former statute provides that "the har-

bor-master may give directions . . . for regulating the time at which, and the manner in which, any vessel shall enter into, go out of, or lie in or at the harbor, dock, or pier, and within the prescribed limits. . . .” That is to say, the harbor-master’s authority extends to the manner in which the vessel is to enter the dock, and her position when therein, and for a disobedience to his directions the 53d section imposes a penalty of not exceeding £20. But the act did not, in my judgment, intend to exempt the pilot or captain of the vessel from the duty of navigating her with proper caution so *far as other vessels are concerned; in [57 other words, the orders of the harbor-master are to be executed with care, and not negligently, as in the present case. In the analogous case of exemption from liability by reason of having a pilot on board, it has been ruled by the Privy Council that in construing the Pilotage Acts it is not enough for the owners “to prove that there was fault or negligence in the pilot—they must prove, to the satisfaction of the court which has to try the question, that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been, in any degree, conducive to the damage”: *The Iona* (¹).

The authority of *The Bilbao* (²) was cited by the respondents; but that was a case decided on demurrer. I have looked at the papers, and find that the defence was as follows:—

And the defendant’s proctor says that before and at the time of the damage complained of, those on board the Bilbao were acting under the directions given by the dock-master of the said Victoria Docks, and within the aforesaid limits of the authority of the said dock-master, and that the said damage, if occasioned by any mismanagement of the Bilbao, was solely occasioned by the default of the said dock-master, and that the owners of the said vessel are not responsible in law for the same.

It was a *datum* in that case that the damage was occasioned solely by the dock-master. Whereas, in this case, it appears that the damage was not caused solely by the orders of the dock-master, but by carelessness in their execution. I must reverse the sentence of the court below, and pronounce the Cynthia to blame for this collision. Costs for appellants.

Solicitor for appellants: *Farnfield*.

Solicitors for respondents: *Flux & Co.*

(¹) Law Rep., 1 P. C., 426, 432. See in *Clyde Navigation Co. v. Barclay* (1 App. now, as to the rule laid down in the Cas., 790).
Iona, the judgment of the House of Lords (²) Lush. Adm., 149.

1875

The Belgic.

Nov. 16, 1875.

THE BELGIC. (7378.)

THIS was a cause of appeal from the City of London Court instituted in the High Court of Admiralty, on behalf of the owners of the steamship Belgic against the dumb barge Kertch, and her owners respondents intervening. The 58] *facts of the case and the nature of the judgment appealed from appear from the judgment of the court.

Nov. 8. *Butt*, Q.C., *G. Bruce*, and *J. P. Aspinall*, appeared on behalf of the appellants and contended that before the collision the Kertch had been moored in an improper place, and that the collision was either inevitable or an accident for which the owners of the Belgic were not responsible, as it had been caused by the orders of the dock-master of the Victoria Docks, under whose control the Belgic was at the time of the collision, or of a pilot who then was on board the Belgic by compulsion of law.

R. E. Webster, and *F. W. Raikes*, on behalf of the respondents: The cases of *The Bilbao* ⁽¹⁾ and *The Earl of Auckland* ⁽²⁾, 10 Vict. c. 27, ss. 52, 53, and 16 & 17 Vict. c. cxxxi, s. 46, were referred to.

Cur. adv. vult.

Nov. 16. SIR ROBERT PHILLIMORE: This is an appeal from the City of London Court in a cause of collision. The Belgic, a screw-steamer, 370 feet long and of between 2,000 and 3,000 tons, on the 25th of November last, in the daytime, came stern foremost out of the Victoria Dock and ran into a dumb barge or lighter called the Kertch, and sunk her, doing also damage to another barge. The owners of the Kertch brought their action against the Belgic in the court below and obtained the judgment of the court in their favor. The learned judge, assisted by nautical assessors, said that he did not decide any point of law, but he found as a fact that the pilot was not exercising control over the steamer and that the master did not take proper precautions in coming out into the river, and therefore was to blame for the collision. The appellants contend that this judgment ought to be reversed upon three grounds, viz.: First, that the Kertch was to blame for lying where she did; secondly, that the Belgic was not responsible because she was under the orders of the dock-master or the pilot; and, thirdly, that the collision was inevitable.

This last ground may be at once disposed of. The collision was clearly evitable. Then, as to the first ground, the Kertch was a dumb barge laden with wood and iron for a ship in the Victoria Docks. The barge arrived at dead low water near the dock entrance, and brought up outside. There were fifty or sixty barges also laying alongside. Two hours before high water the Kertch was ordered by the dock company's servants to shift higher up, which order was obeyed, and one of them handed a rope after coming on board her, saying, "That will do, Bob, here is something that will hold you." Looking to these and other circumstances, I am of opinion that the barge was not to blame for lying where she did. The remaining ground of objection is now to be considered. I agree with the opinion of counsel that the learned judge of the court below had not only a question of fact, but also, to some extent, a question of law, to consider; because if the master was to blame for this collision, it must be on the ground that neither the authority of the dock-master nor of the pilot had superseded at the time of the collision the authority of the master. The dock-master was naturally anxious to get rid of this long steamer in order to admit other vessels waiting to come in. The principal facts appear to be that 59] the gates were opened about an hour and a half before *high water. The dock-master ordered the Belgic to go out astern. About this time a schooner dropped her anchor near the mouth of the entrance. The pilot (who says he was not at that time in charge) seeing that a collision with the schooner on the one side or the barge on the other would be inevitable if the Belgic went out,

⁽¹⁾ Lush. Adm., 143.

⁽²⁾ Lush. Adm., 387.

took upon himself to order the *Belgic* to go ahead, thereby stopping her way. Upon this the dock-master said, "What are you going to do? you can't stop here; you are stopping our work." The pilot said, "We are going to do nothing." And after a pause the dock-master said, "Well, will you let our tug take hold of you and pull you out?" The pilot said, "As you like." The steamer was pulled out, the tug proved too weak to hold the steamer off, and she ran into the barge.

It has been pressed upon me that either the harbor-master or the pilot was in command. The pilot expressly says that he had not as yet taken charge, but I also think that the dock-master was still exercising his authority. I do not think it necessary to consider whether a master would be obliged by the dock-master to execute an order which manifestly would bring about a collision. I think he would not be so obliged, but I need not decide that point, because I am of opinion that no command was given to the master by the dock-master. A proposal was made, which was accepted on behalf of the master. The dock-master is not bound to find a tug for ships in dock, at least no such obligation has been shown to me. The master chose to adopt the tug as his own motive power for the occasion, it proved too weak, and the master is as much responsible to third parties for the consequences as if it had been his own tug. I decline to reverse the decision of the court below, and dismiss the appeal with costs ⁽¹⁾.

Solicitors for appellants: *Wood & Tinkler.*

Solicitor for respondents : *Farnfield.*

(1) From this judgment the owners of the *Belgic* appealed to the Court of Appeal. On the appeal coming on to be heard, the Court of Appeal, without calling on the respondents, dismissed the appeal with costs. C. A., Feb. 29, 1876.

[2 Probate Division, 60.]

Jan. 13, 1877.

***DENCH and DENCH v. DENCH and Others. [60**

Lithographed Will—Alterations—Not noticed by Witnesses—Declarations before Execution—Presumption.

The testator having obtained the lithographed form of a will by which the property was left to all the children absolutely on the death of the wife, filled up the blanks in his own handwriting, and in the place of the bequest to the children interlined the words "To my only son A. B." The bequest to all the children was cancelled by a line drawn through it. No reference was made to the alterations in the attestation clause, nor were any initials placed in the margin to identify them. The surviving attesting witness had no knowledge whether the alterations were made at the time of execution. The testator had one child, a son, by the second wife, who took a life interest under the will, and five children by a previous marriage. The court held that the presumption arising from the ignorance of the witness was rebutted by a declaration of the testator, made previous to the execution of the will, that he intended to provide for the child of the second marriage and by the other circumstances of the case.

EDWARD DENCH of 19 York Place, Brighton, Sussex, died on the 20th of January, 1876, having executed a will bearing date the 2d of May, 1871, in which he appointed Mr. William Martin executor. The will was a lithographed form indorsed, "Form of a will for children absolutely after the death of the wife." It was to the following effect, the words in italics being in the handwriting of the testator, the

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rest lithographed. "This is the last will and testament of me *Edward Dench*, of 19 York Place, Brighton. I direct that all my just debts and funeral and testamentary expenses be paid and satisfied by my executors (*trustee* written over this last word) hereinafter named as soon as conveniently may be after my decease. I give, devise, and bequeath all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, both real and personal, whether in possession, reversion, remainder, or expectancy unto *Mr. William Martin*, ~~and~~ 10 Gloucester Place, Brighton, ^{etc.} their executors and administrators, upon trust, to permit and suffer my dear wife, *Mary Ann B. Dench* to have the use and enjoyment of all such parts as shall not yield income, and to invest the residue of such of my estate as shall not have been applied in payment of my debts and funeral and testamentary expenses in some or one of the 61] *public stocks or funds of Great Britain (not being terminable annuities), and to pay the dividends, interest, and annual produce thereof, and also the rents, interest, and profits of all such other parts of my said estate as shall yield income unto my said wife during the term of her natural life, and from and after her decease I give, devise, and bequeath the same and every part thereof to *my only son Harry Dench* (these words were interlined) and among all and every my children who shall be living at the time of the decease of my said wife in equal shares and proportions, and the issue of such of them as shall be dead (such issue, nevertheless, taking only such share to which their deceased parent should have been entitled in the event of such parent surviving my said wife) (all the words from the interlineation to this last word had been at some time either before or after execution cancelled by running a pen through them) to and for his or their own use and benefit absolutely, and I nominate, constitute, and appoint *Mr. William Martin*, of 10 Gloucester Place, ~~and~~ Brighton, Sussex, executor of this my will." The ordinary attestation clause followed, containing no reference to the alterations, nor were there any initials in the margin of the will to identify them. The will was on the first side of a sheet of paper and completed on that side.

The plaintiffs, namely, the widow, on her own behalf, and on behalf of her son, Harry Dench, propounded this will with the alterations and obliterations appearing thereon. The defendants pleaded that the obliterations, interlineations, and other alterations now appearing in the body of

the said will, were not, nor was either of them, made in the said will before the due execution thereof by the testator.

William Beck, the only surviving attesting witness, deposed that he knew Mr. Dench, the testator, that in May, 1871, Mr. Dench came to his office as a wine merchant with a paper in his hand. His brother Edwin Beck was there. He asked Edwin Beck in deponent's presence to witness his will. Edwin Beck (since deceased) put his signature to it, and then deponent did so also. He identified the signatures of his brother and himself. The deceased wrote his signature just before they did, at any rate, it was there when they signed. The deponent did *not look at the will when [62 he signed it, and he has no recollection whether it was on a lithographed form. It was folded at the time, folded in half, showing only the lower part. Deponent did not notice whether there were any lines struck out when he witnessed it, or whether there were any interlineations. He was busy at the time, and did not observe them. On cross-examination, he said that he and his brother were the only persons present when the will was executed. The table was covered with bottles, leaving only a narrow ledge vacant, which was the reason the will was folded. He could not say whether lines were drawn through any part of the lithographed form. He noticed two handwritings on the will. It seemed to him there were two writings.

Mrs. Dench, the widow, deposed that there was one child (Harry Dench) of her marriage with deceased. She had asked her husband to make a will in his favor. In June, 1871, her husband gave her a paper and said that would do for her, and in 1874 a packet of papers. She did not look at the papers in her husband's lifetime, but after his death it was found that the paper he first gave her was a will dated the 11th of August, 1868, executed before the birth of their child, by which everything was given to her absolutely, and she was named sole executrix. The will now propounded, and in its present state, was found in the packet given to her in 1874.

Mr. Martin deposed that some time after 1869 he visited the deceased at his house at Brighton, and the deceased told him he was going to make a will and name him executor, and that that poor boy (meaning his son by the second marriage) was to be provided for. On a subsequent occasion the deceased produced a will and read the contents to deponent. He then placed the will in deponent's hand, but deponent did not peruse it, nor could he say it was on a

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lithographed form. Moreover, he did not notice who witnessed it.

There was evidence that the deceased had five children by his first marriage who attained the age of twenty-one years; that, under the will of William Lambert, a relation of the first wife, real estate at Brighton, with a rental of £1,000 per annum, was left to the testator for his life, and 63] on his death to the children of the *first marriage who attained the age of twenty-one years absolutely. One of such children attained the age of twenty-one years, but died in the lifetime of his father, who thereby succeeded to his share in the estate. The personalty of the deceased did not amount in value to more than £600 or £700.

In the course of the hearing a discussion arose whether the contents of the will, as read by the deceased to Mr. Martin, could be given in evidence as a declaration made subsequent to the execution of the will, and the cases of *Doe v. Palmer* (¹), and *Sugden v. Lord St. Leonards* (²) were cited. Ultimately the court decided that it would not act on that evidence.

Dr. Deane, Q.C. (*C. A Middleton* with him), for the plaintiffs: The presumption arising from the want of evidence as to the time alterations were made in a will is not so strong in a lithographed as in a written will, because there must necessarily be some alterations and additions made in such a will before execution. All that appears in the handwriting of the deceased was necessary to carry out his intention as expressed to Mr. Martin to make him executor, and that the poor boy should be provided for. The second will was executed to correct the first made before the birth of the child, and which left everything absolutely to the wife. It is inconceivable that the deceased should not have made the alterations before the execution.

Inderwick, Q.C. (*Searle* with him): In a lithographed will a very different presumption arises where it is filled up to complete the form, from where it is filled up to alter the purport of the printed form and reverse its dispositions. In this case the form was indorsed "A form of a will for children absolutely after the death of the wife," and it must be presumed that when the deceased purchased that form he intended to divide his property amongst all his children on the death of his wife. As regards the declaration of the deceased, he may have thought that, by nominating an executor and by specially inserting his son Harry's name in the residuary clause, the interest of that son would be looked

(¹) 15 Q. B., 747; 20 L. J. (Q.B.), 367.

(²) 1 P. D., 154, 225.

after. The ordinary presumption, in the absence of evidence to the *contrary, that alterations were made subse- [64
quent to execution, must prevail in this case.

SIR J. HANNEN (President): The question is, whether the will shall be admitted to proof with the alterations contained therein, more especially whether the words in the residuary clause struck out are to be omitted, and the words *my only son Harry Dench* interlined therein are to be introduced into the probate. I do not think it necessary on this occasion to determine the question whether or not a statement made by a testator after the execution of his will, that the will as altered was his, would be admissible, because from Mr. Martin's evidence it would not follow that the alterations, although made before the conversation with him, were made before the execution of the will. It is clear in law that when a question arises whether alterations on the face of a will were made before or after execution, the statements of a testator made before the execution of the will may be given in evidence, showing an intention to benefit an individual, which will not be carried out unless the alterations are admitted. That was laid down in *Doe v. Palmer* ⁽¹⁾, and the rule has been recognized since. I shall adopt it on this occasion and apply it to the facts before me. At the time he made his will the deceased was not possessed of much property, about £600 or £700, and although he might have foreseen the possibility of deriving a benefit from the death of one or more of the children of the first marriage after they came of age (and he did, in fact, come into possession of one of such children's shares) the language of the will probably referred to the property of which he was then in possession. After the child of the second marriage was born his attention was called to the necessity of making a provision for that child, and although Mr. Martin does not give the exact date of his conversation with the deceased, he is under the impression that the second will was made to carry out the intention expressed in such conversation. From the evidence of Mr. Martin it is certain that the testator intended to make a special provision for the child of the second marriage, "the poor boy must be provided for or looked to." If the will is to *stand [65
in the way it was drawn in the lithographed form before the alterations were made, Harry Dench would share only with his other brother and sisters of the half-blood in personalty, which might have been of the value of £700, a provision for him of £100 and no more, against £200 per annum

⁽¹⁾ 15 Q. B., 747; 20 L. J. (Q.B.), 367.

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received by each of the other children. It would be idle to speak of that as a fulfilment of the intention expressed by the deceased to provide for the poor boy. And as it is a provision that does not satisfy the expressed intention of the testator, it is incredible that the will was executed in that form. But I find that alterations have been made in the will which would carry out the expressed intentions of the testator, by which he leaves all the property to Harry Dench which he had given to his mother for her life. That is a disposition which leads me to think that the alterations must have been made before the time of the execution of the will. If otherwise, the will would not have carried out the intentions of the testator, but have disappointed them. I rest my decision on the declaration of the testator, and not on the appearance of the document. I cannot draw any conclusion from the color of the ink, and the evidence of the attesting witness leaves the question quite undecided, for the will was turned down and doubled in half when he signed it, and he is not able to say what alterations were there. The reason, therefore, why I have come to the conclusion to admit the will to probate in its present state is, that the alterations must have been made at the time of execution, otherwise the document would not have carried out the expressed determination of the testator to provide for the son of the second marriage.

Solicitors for plaintiffs: *Woddilove & Nutt.*

Solicitors for defendants: *Nash & Field.*

See 14 Eng. Rep., 585 note; 16 Eng. Rep., 585 note.

The alteration of a promissory note, by the direction of one of several joint makers thereof, without the consent of the other makers, discharges the latter from all liability thereon, even as against a *bona fide* holder: *Greenfield v. Stowell*, 123 Mass., 196; *Bradley v. Mann*, 37 Mich., 1; *Robinson v. Reed*, 46 Iowa, 219; *Aldrich v. Smith*, 37 Mich., 468; *Schnewind v. Hacket*, 54 Ind., 248.

And no recovery can be had on the original consideration: *Robinson v. Reed*, 46 Iowa, 219.

If a condition to a promissory note be written below the signature on the same piece of paper, the removal of the condition by tearing the paper is such an alteration as renders the note void in the hands of a *bona fide* holder: *Gerrish v. Glines*, 56 N. H., 9.

See *Cornell v. Nebeker*, 58 Ind., 425.

Though one to whom a note with a blank for the date is delivered has a right to fill in a date in Indiana, it has been held he has no authority to insert a date prior to the true date of its execution, and if one *knowing the facts* take such note it will not, in his hands, bind the maker: *Emmons v. Meeker*, 55 Ind., 321.

An alteration of an instrument by accident, or in good faith, will not avoid it so as to prevent the party doing so from restoring it to its former condition: *Landis v. Keller*, 34 Leg. Int., 186; *Osgood v. Miller*, 67 Maine, 176; *McRaven v. Chrisler*, 53 Miss., 542.

See *Aldrich v. Smith*, 37 Mich., 468.

The signing of a promissory note after its inception by another maker is not such an alteration as to release the original maker: *Gano v. Heath*, 36 Mich., 441; *Miller v. Finley*, 26 Mich., 249.

Otherwise in *Iowa*: *Hamilton v. Hooper*, 46 *Iowa*, 515.

An immaterial alteration does not avoid an instrument: *Rudesill v. Jefferson Co.*, 85 *Ills.*, 446.

Nor one to correct a mistake and make it conform to the actual agreement and intent of the parties: *McRaven v. Chrisler*, 53 *Miss.*, 542; *Osgood v. Miller*, 67 *Maine*, 176; *Ames v. Colburn*, 11 *Gray*, 390.

The alteration of the *number* of a bond by a thief is not a sufficient alteration to destroy its validity: *Force v. City of Elizabeth*, 29 *N. J. Eq.*, 587, reversing 28 *id.*, 403.

Makers of a note consenting to its alteration are bound thereby: *Myers v. Nell*, 84 *Penn. St. R.*, 369.

As to the liability of the maker of a note which he was induced to sign by fraudulently reading or stating its contents to him, he understanding it to be a different paper, and when held liable, see *Maine*, etc., *v. Hodgkins*, 66 *Maine*, 109; *Ross v. Doland*, 29 *Ohio St. R.*, 473; *Winchell v. Crider*, 29 *Ohio St. R.*, 480; *Battles v. Lautenslager*, 84 *Penn. St. R.*, 446; *Roach v. Karr*, 18 *Kans.*, 529; *Mosher v. Carpenter*, 18 *Hun*, 602; *Dickerson v. Evans*, 84 *Ills.*, 451, 455; *Cornell v. Nebeker*, 58 *Ind.*, 425.

When held not liable: see *Hobbs v. Solis*, 37 *Mich.*, 357; *Chatellon v. Canadian*, etc., 27 *U. C. Com. Pl.*, 450; *Decamp v. Hamnea*, 29 *Ohio St. R.*, 467; *Sim v. Pyle*, 84 *Ills.*, 271; *Van Brunt v. Singley*, 85 *Ills.*, 281.

And when may show was intimidated into execution: *Mulrey v. McDonald*, 124 *Mass.*, 845.

As to when a party is bound by a release of all damages for injuries received, and cannot avoid it on the ground that it was fraudulently procured: see *Penn. R. R. Co. v. Shay*, 82 *Penn. St. R.*, 198, 202-3, 33 *Leg. Int.*, 328.

A surety upon a bond will not be discharged from liability by the fact that the name of a co-surety, on the faith of which his signature has been procured, was a forgery, nor by the fact that the surety whose name was forged gave him no information of the fact, where the condition upon which the surety signed is unknown to the officer to whom the bond is given, at the time he accepts the same: *State v. Baker*, 64 *Missouri*, 167; *Eastwood v.*

Westley, 6 *U. C. K. B. (O.S.)*, 55; *Terry v. Hazlewood*, 1 *Duvall (Ky.)*, 104; *Trevathan v. Caldwell*, 4 *Heisk. (Tenn.)*, 585; *State v. Pepper*, 31 *Ind.*, 76; *Stoner v. Millikin*, 85 *Ills.*, 218; *York*, etc., *v. Brooks*, 51 *Maine*, 506; *Selser v. Brock*, 3 *Ohio St. R.*, 302, overruling in effect *Seeley v. People*, 27 *Ills.*, 173, 2 *Am. Law Reg. N.S.*, 344.

If a surety to a bond execute it upon condition that it shall not be delivered, or take effect until signed by a third person, he is not bound thereby if the facts be known to the obligee, or he have notice thereof, at the time of delivery and acceptance: *Harrington v. Wright*, 48 *Verm.*, 427; *Hill v. Sweetzer*, 5 *N. H.*, 168; *Awde v. Dixon*, 6 *Exch.*, 869, 5 *Eng. Law & Eq. Rep.*, 512; *Evans v. Bremridge*, 8 *De Gex, Macnaghten & Gordon*, 100; *Austin v. Farmer*, 30 *U. C. Q. B.*, 10, and cases cited; *Seymour v. Cowing*, 1 *Keyes*, 532; *McClung v. Baird*, 77 *N. C.*, 201.

See *Leaf v. Gibbs*, 4 *C. & P.*, 466; *U. S. v. Leffler*, 17 *Pet.*, 86.

One who takes a note so made is bound to show he is a *bona fide* holder without notice and for value: *Metler v. Gamble*, 4 *Barb.*, 146; *Small v. Smith*, 1 *Den.*, 583.

The conduct of the surety, at the time of or subsequent to the delivery, may establish a waiver of such condition: *Sidney v. Holmes*, 16 *U. C. Q. B.*, 268; *Henderson v. Vermilyea*, 27 *U. C. Q. B.*, 544; *Leaf v. Gibbs*, 4 *Carr. & P.*, 466.

Even though one execute a bond upon condition known to the obligee that it shall be signed by another, he is liable thereon to one having notice of such conditional signing, though not so signed, if such other be the principal in the bond: *Williams v. Marshall*, 42 *Barb.*, 524; *Rastall v. Attorney-General*, 18 *Grant's (U.C.) Chy.*, 138, overruling 17 *Grant*, 1.

See *Cooper v. Evans*, *L. R.*, 4 *Eq.*, 45.

Contra: *Wildcat*, etc., *v. Ball*, 45 *Ind.*, 213; *Hall v. Parker*, 37 *Mich.*, 590; *Knight v. Hurlbut*, 74 *Ills.*, 133; *Ney v. Orr*, 2 *Mont.*, 559.

If one deliver a bond as an escrow, he is not liable thereon if it be delivered without his knowledge, contrary to the terms of the escrow: *Ford v. James*, 2 *Abb. Court App. Dec.*, 159, and see cases cited in note as to what is a delivery and what not.

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If A. sign a bond as surety upon condition that B. shall also before delivery sign it as surety, and C. so sign it, but B. do not, C. cannot maintain an action against A., for contribution: *Barry v. Moroney*, Irish L. R., 8 C. L., 554, reversing 7 id., 110.

If a surety sign a bond, in the body of which another contracting party is named, he is *prima facie* bound although delivered without being executed by such other party, unless he make it a condition that it shall not be delivered without the signature of the other person so named.

Indiana: *Wildcat, etc., v. Ball*, 45 Ind., 213.

New York: *Dillon v. Anderson*, 43 N. Y., 234; *McLaughlin v. McGovern*, 34 Barb., 208; *Parker v. Bradley*, 2 Hill, 584; *Russell v. Freer*, 56 N. Y., 67.

Pennsylvania: *Simpson v. Bovard*, 74 Penn. St. R., 851.

Virginia: *Nash v. Fugate*, 24 Gratt., 202.

Though the current of authority seems to be that if one be named in a bond as a party thereto, and a surety sign it upon condition expressly imposed that it shall not be delivered until signed by such other party, the fact that the other party was named in the bond as a party thereto is notice to the party taking the same of the condition.

California: *Barber v. Burrows*, 51 Cal., 404.

Canada, Upper: *Huron Co. v. Armstrong*, 27 U. C. Q. B., 533.

England: *Awde v. Dixon*, 6 Exch., 869, 5 Eng. L. & Eq. Rep., 512.

Indiana: *Wildcat Branch v. Ball*, 45 Ind., 213.

Michigan: *Hall v. Parker*, 37 Mich., 590.

Even though a promissory note: *Gibson v. Miller*, 29 Mich., 355.

Missouri: *Fales v. Filley*, 2 Mo. App. Rep., 345; *Ayres v. Milroy*, 53 Mo., 516.

Montana: *Ney v. Orr*, 2 Mont., 559.

New Brunswick: See *Keator v. Scovil*, 3 Kerr, 647.

New York: *Richardson v. Rogers*, 50 How. Prac., 407; *People v. Bostwick*, 32 N. Y., 445, 43 Barb., 9, as explained 50 How. Prac., 407.

Though if the name of a party once inserted in a bond be erased, the mere

fact of such insertion and erasure is no notice to the obligee: *Russell v. Freer*, 56 N. Y., 67, distinguishing and questioning *People v. Bostwick*, 32 N. Y., 445.

Pennsylvania: *Warfield v. Frantz*, 76 Penn. St. R., 88, 2 Leg. Chron. Rep., 245.

Even though a promissory note: *Losee v. Bissell*, 76 Penn. St. R., 459.

A party who executes a bond on condition that it shall not be binding upon him until signed by another party named by him, but not named in the bond, is liable thereon though not executed by such party, provided the person to whom the bond is executed have no knowledge or notice of such conditional execution.

California: *Tidball v. Halley*, 48 Cal., 610.

Canada, Upper: See *Austin v. Farmer*, 30 Q. B., 10, and cases cited.

Indiana: *Hunt v. State*, 53 Ind., 321; *State v. Pepper*, 31 Ind., 76, 8 Am. L. Reg., N.S., 665.

Maine: *State v. Peck*, 53 Maine, 284; *York Co., etc., v. Brookes*, 51 Maine, 506.

Michigan: *McCormick v. Bay City*, 23 Mich., 457.

Missouri: *State v. Potter*, 63 Missouri, 212.

But see *Linn v. Farris*, 52 Mo., 75, 14 Am. Rep., 389; *Ayres v. Milroy*, 53 Mo., 516, 14 Am. Rep., 465, and cases cited.

Nebraska: *Cutler v. Roberts*, 7 Neb., 4.

New York: *Russell v. Freer*, 56 N. Y., 67; *Richardson v. Rogers*, 50 How., 403; *Belloni v. Freeborn*, 63 N. Y., 883.

North Carolina: *Gwyn v. Patterson*, 72 N. C., 189.

Ohio: *Dalton v. Miami, etc.*, 2 Am. Law Record, 329, Superior Court, Cincinnati.

United States: *Dair v. U. S.*, 16 Wall., 1; *Butler v. U. S.*, 21 Wall., 272.

Vermont: *Passumpsic, etc., v. Page*, 31 Verm., 315; *Dixon v. Dixon*, 31 Verm., 450.

Virginia: *Miller v. Fletcher*, 1 Vir. L. J., 43, 27 Gratt., 403; *Nash v. Fugate*, 24 Gratt., 202, 1 Am. L. T. Rep., N.S., 69.

A *bona fide* holder of negotiable paper before due, without notice, is not

affected by the signing or indorsement thereof by a surety upon conditions.

Connecticut: *Greathead v. Walton*, 40 Conn., 226.

Indiana: *Spitler v. James*, 32 Ind., 202.

New York: *Small v. Smith*, 1 Den., 583.

One who was named in a bond, had repeatedly signed similar bonds; the principal delivered a bond in which he was named but which he had not signed, saying he would come in and sign it. He did not do so, but supposing he had promised to pay: Held, that there was no such contract as

could be enforced against him in equity: *Pratt's Appeal*, 41 Conn., 191.

See *Judge v. Thomson*, 29 U. C. Q. B., 523.

Parties not named as sureties in a bond are liable if they sign the same at the end thereof as such: *Stewart v. Carter*, 4 Neb., 564.

In *Virginia* it has been held that sureties who sign a blank bond to be filled up by their principal are not bound thereby, though so filled up and delivered, because a bond executed in *blank* is invalid: *Penn v. Hamlett*, 27 Gratt., 337.

[2 Probate Division, 66.]

Jan. 23, 1877.

*In the Goods of DE ROSAZ.

[66

Will—Appointment of Executor—Ambiguity—Parol Evidence.

The deceased, by his will, appointed certain executors, and amongst others "Percival . . . of Brighton, the father." The court admitted evidence of the circumstances under which the deceased made his will, and of the persons about him, in order to satisfy itself who was meant by the imperfect description of the executor contained therein.

THE Chevalier François de Rosaz, of Brighton, Sussex, died on the 21st of September, 1876, having duly executed his last will and testament, bearing date the 11th of September, 1876. By this will he gave considerable bequests to institutions and for charitable purposes at Brighton, and appointed executors as follows:—

"The Mayor of Brighton pro tempore being.

"The precedent *May* of the precedent year.

"The very Reverend Canon . . . Rymer, Rector of St. Joseph Church Catholic of St. James Street, Brighton, and all his successors pro tempore being.

"The Rector of the Presbyterian Church pro tempore being.

"The Rector of St. Nicholas Church pro tempore being.

"Robert Frederick . . . Director of Union Bank, Chancery Lane.

"Francis Bradley Archer, Assistant Director of Union Bank.

"Percival . . . of Brighton, Esquire, the Father.

"Hamilton Ross, Esquire, of London.

"The Director of the Museum of Brighton pro tempore being.

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“The Curate Assistant of St. Joseph pro tempore.

“I appoint as the solicitor of the executorship of my will Richard Taylor, junior.”

Charles Frederick Toovey, in his affidavit, stated that he assists his father in his business of a law stationer. That in the year 1876 the Chevalier de Rosaz forwarded to their office a rough draft of his will contained in several pieces of paper, which he instructed them to have engrossed for his signature. That the same was very badly and illegibly 67] written, and when the clerk to whom *such draft had been given came to that part of the draft where the testator named his executors he was unable to read the surnames of two of the persons intended to be appointed as executors, and by his father's directions the clerk left such surnames in blank, one of which was “Percival . . . of Brighton, Esquire, the father.” When the will was engrossed the deponent took it to the testator at his residence, and pointed out to him the two blanks. He then commenced to read to the testator the will as engrossed, but did not do so completely from the beginning to the end, as testator was unwell, and got impatient and apparently weary of attending to the reading, and asked deponent to leave, which he did. The will was afterwards executed by the testator without having had the blanks filled up. In a second affidavit the deponent admitted that the name which appeared after Percival in the draft will was clearly Boxall, and that if he had looked at the paper at the time he should have ordered that name to be inserted. Mr. Boxall, in his affidavit, stated that he became acquainted with the testator in the year 1872. That in the year 1873 the testator continually consulted deponent both by letter and verbally, as to certain bequests he signified his intention to make for the benefit of the town of Brighton, and asked deponent, who took a leading part in the management of such charities, to prepare a list of the most deserving, which was done, and to be his executor and trustee. In the beginning of the year 1875 the testator brought deponent a paper, which he said was his will, and requested that a copy should be made of it for the use of deponent. That was done. It was dated the 2d December, 1874, and appointed deponent executor. He continued to be intimate with testator until the time of his death. Deponent's names are William Percival Boxall, but he was known and addressed by deceased and others as Percival only. He has a son with whom the deceased was acquainted, whose names are Percival Gratwisch Boxall. It did not

appear that there was any other person known to deceased of the name of Percival.

Dec. 12, 1876. *C. A. Middleton* moved the court to grant probate of this will to Mr. William Percival Boxall, as the person intended by the testator under the description of "Percival . . . *of Brighton, Esquire, the father." [68] He submitted that the court has a right to ascertain all the facts which were known to the testator at the time he made his will, and place itself in his position in order to ascertain if it can, with sufficient certainty, the persons or things designated by the language used therein. The facts clearly proved and admissible in this case, apart from evidence of intention, were sufficient to satisfy the court that his client was the person intended by the words "Percival . . . of Brighton, Esquire, the father." He further contended that if that was not sufficient, this was a case of equivocation, and, as such, evidence of intention was admissible. He referred to *Price v. Page*(¹); *Doe v. Hiscocks*(²); *Charter v. Charter*(³); Jarman on Wills, 3d ed., pp. 402, 403.

Bayford appeared for the other executors.

Cur. adv. vult.

Jan. 23. SIR J. HANNEN (President): This was an application for a grant of probate to a person claiming to be one of the executors named in the will of the Chevalier François de Rosaz, deceased. The testator appointed several persons executors of his will, and amongst them one is thus described, "Percival . . . of Brighton, Esquire, the father." The applicant, whose complete names are William Percival Boxall, claims to be the person designated by the testator. The first question which I have to determine is, whether parol evidence is admissible to any, and if to any, to what, extent, in order to assist the court to ascertain the meaning of the testator as expressed in his will. I have said *as expressed in his will*, because it is clearly settled law that the court is not entitled to inquire into the intention of the testator apart from the language which he has used. The whole of the testator's will must be in writing, and the court is therefore confined to putting an interpretation on words actually used by him; or as the rule is expressed by Sir J. Wigram (paragraph 6): "The judgment of a court in expounding a will should be simply declaratory of what is in the instrument." In considering, therefore, whether a particular person or thing has been sufficiently indicated by a testator, *there must be some words to which [69]

(¹) 4 Ves., 680.

(²) 4 M. & W., 363.

(³) Law Rep., 7 H. L., 364.

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the required meaning may be attached. A complete blank cannot be filled up by parol testimony, however strong. Thus a legacy to Mr. — cannot have any effect given to it: *Baylis v. Attorney-General* ⁽¹⁾, nor a legacy to Lady —: *Hunt v. Hort* ⁽²⁾. But if there be any words to which a reasonable meaning may be attached, parol evidence may be resorted to to show what that meaning is. Thus a legacy to a person described by an initial, as to Mrs. C., admits of explanation as by showing that the testator was accustomed to speak of a particular person by the initial of her name: *Abbott v. Massie* ⁽³⁾, *Clayton v. Lord Nugent* ⁽⁴⁾. And where a blank was left for the Christian name, parol evidence has been admitted to show who was intended: *Price v. Page* ⁽⁵⁾. In the present case there are words which are capable of bearing an intelligible meaning. Looked at by themselves, without the aid of extrinsic evidence, they convey this meaning, that the testator appoints as one of his executors a person bearing the Christian name of Percival, who resides at Brighton, and has a son.

The question is, whom did the testator intend to point out by this description? In order to answer this question, Sir J. Wigram's fifth proposition must be called in aid: "For the purpose of determining the object of a testator's bounty, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator and of his family and affairs for the purpose of enabling the court to identify the person intended by the testator." Applying this proposition to this case, it appears that the testator had an intimate friend of the name of William Percival Boxall (the present applicant), residing in Brighton; that the testator was accustomed to address him as Percival, omitting the name of William; that he had appointed him as his executor under a previous will; that Mr. Boxall had a son also named Percival, well known to the testator; and lastly, that no one else bearing the name of Percival, either as surname or Christian name, was known to him. In these circumstances 70] it appears to me that the words used by the *testator necessarily point to the present applicant. It is true that at the present day, and amongst persons of the station in life occupied by the deceased, it is at least unusual to designate a man by his Christian name without the surname, though accompanied by his place of residence and the distinguishing

⁽¹⁾ 2 Atk., 239.⁽²⁾ 3 Bro. C. C., 311.⁽³⁾ 3 Ves., 148.⁽⁴⁾ M. & W., 207.⁽⁵⁾ 4 Ves., 680.

adjunct of "the elder" or "the father"; but though unusual, it is not incorrect, and assuming, as I am bound to do, that the words are really those of the testator, circumstances may be easily imagined which would account for his making use of such a description. Suppose a testator should desire to leave a legacy to a particular person whose surname was unknown to him; not an uncommon state of things amongst the poor in some parts of the country. A description of him by his Christian name and his place of abode in a small village would, in many cases, be sufficient. If the name were an uncommon one, the evidence would be stronger; and if he were described as the father, and it were shown that no other person than one father and one son bore that name in the parish, the case would amount to certainty, and though it may be conjectured that greater difficulty might arise in ascertaining who was meant as to a person bearing a common Christian name and residing in a populous place, such as Brighton, this cannot alter the principle applicable to the two cases. There is, however, in this case no reason to suppose that there is any person to whom the description given in the will can apply unless it be to the present applicant, indeed, there is evidence that there is no such person; and I am therefore able to see without any doubt that the applicant is the person designated by the language of the will.

I have dealt with the case thus far on the supposition that evidence of testator's declarations of intention are not admissible. In the case of *Charter v. Charter* (1) the Lord Chancellor (Lord Cairns) says: "The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons or two things." Sir J. Wigram states the proposition thus (prop. 7, par. 194): "The only cases in which evidence to prove intention is admissible are those in which the description in the will is unambiguous in [7] its application to each of several subjects." If these expositions of the law are to be taken without any qualification, evidence of the testator's expressed intention could not be given in this case, for there is here only *one* known subject to which the testator's language can apply. It is possibly open to question whether such a case as this was in the contemplation of Lord Cairns and Sir J. Wigram. As I have said, it is not shown here that there is any other person who could properly be designated as "Percival . . . of Brighton, Esquire, the father." If there were any such, parol evi-

(1) Law Rep., 7 H. L., 377.

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In the Goods of Blackwell.

dence of the testator's intention would be admissible ; is such evidence the less admissible because the claimant has no competitor ? Probably the answer is, that if the description in the will is in itself sufficient to define the only known subject to which it is sought to apply it, no evidence of intention is needed ; if it is insufficient, such evidence is inadmissible. "In point of principle," says Sir J. Wigram (prop. 7, par. 192) "it is submitted that a description which is so imperfect as to be useless as it stands—i.e., useless unless it be aided by evidence of intention—is not distinguishable from one which is wholly incorrect." It is not, however, necessary for me to express a positive opinion on this point, as I decide the case irrespective of the testator's expressed intention ; but if evidence of his declarations be admissible, the matter might have been disposed of in a very few words, for I have before me the draft in the testator's own handwriting, from which the will was copied, and in that the name of Percival Boxall is clearly written. The explanation of the omission being, that in the haste of copying the word was passed over as illegible, though the stationer now admits, as the fact is, that the word is plainly discernible. The interests involved in the present application are of small importance, but I thought it necessary to consider it at some length on account of the serious question of principle on which its determination depends.

Solicitors for applicant : *Boxall & Boxall.*

Solicitors for other executor : *Taylor & Son.*

[2 Probate Division, 72.]

Feb. 6, 1877.

72]

*In the Goods of BLACKWELL.

Will—Appointment of Executors—Uncertainty.

The testator, by his will, appointed one of his sisters sole executrix. He had three sisters living at that time, but two died in his lifetime :

Held, that the appointment was void from uncertainty.

BENJAMIN BLACKWELL, late of Chertsey, Surrey, died on the 10th of December, 1876. He executed a will dated the 1st of June, 1868, to the following effect : "This is the last will and testament of me, Benjamin Blackwell, of Chertsey, in the county of Surrey, grocer and cheesemonger. I devise and bequeath all my real and personal estate, of whatsoever nature or quality, and wheresoever situate, of which I may be possessed or entitled unto at the time of my death, unto

my three sisters, viz., Jane, Mary Ann, and Ann Blackwell, or to which of them as are alive at the time of my decease. And I do hereby appoint one of my sisters my sole executrix of this my last will, hereby revoking all other wills or testamentary bequests by me at any time heretofore made.”

Mary Ann and Ann died in testator's lifetime. Jane Blackwell, now eighty years of age, alone survived him.

Searle moved for probate to be granted to Jane Blackwell: Although there was some uncertainty as to whom the testator intended to appoint as his executor at the time he made his will, that uncertainty had ceased when the will came into operation, for there was only one sister then living. [He referred to *In the Goods of Baylis* ('); Jarman on Wills, 3d ed., vol. i, p. 330.]

SIR J. HANNEN (President): The question is, which sister did the testator appoint as executrix. I cannot infer from the words of the will that the testator intended to appoint any particular sister executrix. I may conjecture that he would have given directions to appoint the surviving sister if he had foreseen the events that have happened; but he has not done so. I cannot distinguish this case from that of *In the Goods of Baylis* ('), and I reject the motion.

Solicitors: *Nelson, Son & Hastings*.

(') 2 Sw. & Tr., 613; 31 L. J. (P. M. & A.), 119.

[2 Probate Division, 73.]

Feb. 20, 1877.

*In the Goods of HUGO.

[73

Will—Conditional—Clause of Revocation.

The deceased made a will, by which he left all his property to his wife, and made her sole executrix. He subsequently, with his wife, executed a joint will, which was expressed to take effect in case they should be called out of the world at one and the same time and by one and the same accident. By this will they revoked all former wills. The deceased died in the lifetime of his wife:

Held, that the joint will was dependent upon a contingency which did not happen, and was, therefore, inoperative even to revoke a previous will.

THE Reverend Thomas Hugo, of the Rectory, West Hackney, Middlesex, died on the 31st of December, 1876, leaving a widow, Agnes Jane Hugo, and three sisters, Avis, Frances Mary, and Elizabeth Hugo surviving him. On the 15th of March, 1864, he duly executed his will on a lithographed form, by which he left his whole property, real and personal, to his wife absolutely, and appointed her sole executrix. On the 12th of October, 1874, he and his wife duly

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In the Goods of Hugo.

executed a joint will, which commenced: "This is the last will and testament of us, Thomas Hugo and Agnes Jane Hugo, his wife, residing at the Rectory House, West Hackney, in case we should be called out of this world at one and the same time and by one and the same accident." They thereby appointed the Reverend John Young, the Reverend Bradley Abbot, and the Reverend Charles Gutch trustees and executors, left an annuity to the sisters of Mr. Hugo, and the residue of the joint property to found, so far as it would, a fund for old, infirm, and destitute priests of the Catholic Church, whether Greek, Roman, or Anglican, celibates or widowers, to be called the fund of the Good Shepherd, and revoked all former wills. It appeared, from the affidavit of Mrs. Hugo, that, in the month of October, 1874, her husband and herself were about to make a railway journey, and there having been then very recently a serious railway accident, they agreed to make a joint will, to take effect in the event of their meeting with such an accident, and both being killed at the same time, which accordingly her husband wrote out. They, however, returned home in safety.

After the death of the deceased the will of 1864 was found in an envelope, with five sheets of note paper, headed "Earnest wishes," containing directions in the handwriting of the deceased, and dated, "The morrow of the feast of 74] our Lord's Ascension, *1875." The joint will was found loose amongst other papers. The executors of the joint will and the sisters of the deceased consented that probate should be granted of the will of the 15th of March, 1864.

Dr. Swabey moved accordingly: There is no doubt that the will of October, 1874, is inoperative as being dependent upon a contingency which never happened. But a difficulty has been raised, whether, it having been duly executed and containing a clause revoking all former wills, the will of 1864 is not thereby invalidated. In the paper headed "Earnest wishes," written by the testator in 1875, he assumed that the will of 1864 was still operative, and that the whole property would belong to his wife. It is submitted that every part of the will, the clause of revocation included, is dependent upon the contingency, and that the deceased never intended that, if his wife survived, the previous will should be revoked. [He referred to *Parsons v. Lanoe* ⁽¹⁾; *In the Goods of Winn* ⁽²⁾; *In the Goods of De Silva* ⁽³⁾.]

⁽¹⁾ 1 Ves. Sen., 190.

⁽²⁾ 2 Sw. & Tr., 147.

⁽³⁾ 2 Sw. & Tr., 315; 30 L. J. (P. M. & A.), 171.

SIR J. HANNEN (President): I think this application must be granted. In the case of *In the Goods of De Silva* (¹) Sir C. Cresswell granted probate of a codicil, although conditional, because it would have the effect of republishing the will, or even of making it valid, if it had not been duly executed. I agree in that decision, relating as it does to a codicil to a will. Now, the question I have to consider is, whether this instrument ought to be admitted to probate at all as the will of the testator. To determine that I must see whether or not the bequests are left absolutely or only conditionally. The words are, "This is the last will and testament of us, &c., in case we should be called out of this world at one and the same time and by one and the same accident." The condition did not happen, and I consider, therefore, the will is inoperative. The same question was before this court on two occasions, *In the Goods of Winn* (²), and in *Roberts v. Roberts* (³). In the last case the testator executed the paper lest anything should happen to him on his passage to Wales, or during his stay there. He returned from that trip, and the court held that the paper was conditional, and on that ground pronounced against it. The *observation of counsel that if the will be conditional [75 the condition must attach to the whole document, is, I think, well founded, and therefore, when the testator revoked all former wills, he only did so subject to the happening of the contingency. I decree probate of the will of March, 1864.

Proctors: *Heales & Son*.

(¹) 2 Sw. & Tr., 315; 30 L. J. (P. M. & A.), 171. (²) 2 Sw. & Tr., 147.
(³) 2 Sw. & Tr., 337; 31 L. J. (P. M. & A.), 46.

[2 Probate Division, 81.]

March 17, 1877.

*SOTTOMAYOR, otherwise DE BARROS, v. DE [81
BARROS.

Nullity of Marriage—Consanguinity—First Cousins—Marriage illegal by the Law of Domicile.

The petitioner and respondent, Portuguese subjects and first cousins, came to reside in England in 1858. In 1866 they went through a form of marriage before the registrar of the district of the city of London. In 1873 they returned to Portugal, and continue to reside there. By the law of Portugal a marriage of Portuguese subjects, being first cousins, without dispensation, wheresoever contracted, is invalid:

Held, that the court of the place of contract of marriage is not bound to recognize

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the incapacities affixed by the law of the domicile of the parties to a contract of marriage, if such incapacities do not exist according to the *lex loci contractus*, and to pronounce a marriage, otherwise valid, to be null and void by reason of such incapacity.

IN this case the petitioner Ignacia Clara Maxima Pacheco Pereira Pamplona da Cunha Sottomayor, described as of Lisbon, in the kingdom of Portugal, applied to the court to declare her marriage with the respondent Gonzalo Lobo Pereira Caldos de Barros to be null and void. The petition set out a form of marriage between the parties on the 21st of June, 1866, at the registry office in the city of London; it then proceeded: 2. That your petitioner and the respondent are both natives of Portugal and Portuguese subjects, and were at the date of the said marriage domiciled in the kingdom of Portugal. 3. That your petitioner and the respondent are natural and lawful first cousins, and that according to the law, in force in Portugal at the time of the said marriage and now, first cousins are incapable of contracting marriage on account of consanguinity. 4. That your petitioner and the respondent have never cohabited as husband and wife, and the said marriage has never been consummated, and for the reasons aforesaid is null and void in law. 5. That the marriage aforesaid was procured by fraud upon the petitioner. 6. That when the petitioner went through the said ceremony of marriage she was ignorant that she was contracting a valid and binding marriage. (These two last paragraphs were added by authority of the court in an order dated the 5th of July, 1876.)

The petition was personally served upon the respondent 82] at *Labrosa, in Portugal, and he entered an appearance to the citation, but did not file an answer, and the matter came on for hearing as unopposed before Sir R. J. Phillimore on the 5th of July, 1876, who directed that the petition when amended should be served on the solicitor of the respondent, and that the papers in the suit should be sent to Her Majesty's Proctor in order that he might, under the direction of the Attorney-General, instruct counsel to argue before the court the question whether the petitioner had shown a sufficient ground for a decree of nullity, first, by reason of the incapacity of the parties to contract marriage in 1866; secondly, by reason of fraud as shown by the evidence laid before the court; thirdly, by reason of the petitioner's want of intention to contract a marriage, and of her ignorance of the effect of the ceremony as shown by the evidence already laid before the court.

In consequence of this order, on the 22d of Novem-

ber, 1876, the Queen's Proctor filed his answer as follows: 1. That the petitioner and respondent have been acting in collusion for the purpose of obtaining a decree of nullity of marriage. 2. That on the 21st of June, 1866, the petitioner and respondent, being capable of contracting marriage, were lawfully married by license at the registry office for the district of the city of London. 3. That the said marriage was not procured by fraud upon the petitioner as in the fifth paragraph of her petition alleged. 4. That the said petitioner intended to and did contract a lawful marriage by the ceremony observed as above alleged, and was not ignorant of the effect thereof. 5. That the petitioner and respondent cohabited as husband and wife, and that the said marriage was consummated, and is good in law. 6. That at the time of the said marriage the petitioner and respondent were domiciled in England, and were not domiciled in the kingdom of Portugal. 7. That the petitioner and respondent intended at the time of the said marriage to live together as man and wife in England, and did so live for six years; that the validity of the said marriage is to be determined by the law of England. He prayed the court to dismiss the petition, and pronounce for the validity of the marriage. As regards the charge of collusion, the particulars filed were that the petitioner and respondent agreed and combined together to have a petition for a decree of nullity of marriage presented, and to have divers facts *alleged and proved [83 under the petition which were untrue to the knowledge of them both, and agreed that the petition should set up a sham case herein.

The evidence in the case was chiefly taken in Portugal on commission, and the following facts were proved: that the petitioner and respondent were both born at Oporto, in Portugal, the latter in 1850, and the former in 1851, and were first cousins; that they were, and are, Roman Catholics, and domiciled Portuguese subjects. That in the year 1858 the petitioner, her father and mother, and her uncle De Barros and his family, including the respondent, his eldest son, came to England, and the two families occupied a house jointly in Dorset Square, London. The petitioner's father came to this country for the benefit of his health, and De Barros for the education of his children and to superintend the sale of wine. De Barros subsequently, in 1861, became manager to a firm of wine merchants in London, under the style of Caldos Brothers & Co., of which the petitioner's father was made a partner, and which stopped payment in

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1865. De Barros died in London in 1870, and his son, the respondent, returned to Portugal in 1874, having inherited some landed property at Alto Douro, in Portugal. The petitioner returned to Portugal in January, 1873, and her father was removed there in a state of imbecility in September, 1874.

On the 21st of June, 1866, the petitioner, at that time of the age of fourteen and a half years, and respondent sixteen years of age, were married in the registrar's office of the city of London, in the presence of the mother of the petitioner and the father of the respondent and the grandmother of both parties. No religious ceremony accompanied or followed such marriage, and although the parties lived together in the same house until the year 1872, they never slept together, and the marriage was never consummated. The petitioner stated that she went through the form of marriage contrary to her own inclination, by the persuasion of her uncle and mother, on the representation that it would be the means of preserving her father's Portuguese property from the consequences of the bankruptcy of the wine business. The marriage was never recognized by the respondent or by the friends and relations of either party. It appeared, from the *evidence of advocates acquainted with the law of Portugal that, as at the time of marriage the petitioner and respondent were natives of Portugal and Portuguese subjects and domiciled there, and were natural and lawful first cousins, the marriage was null and void, because, by the law of Portugal, first cousins are incapable of contracting marriage on account of consanguinity, and such marriage would be held by such law to be incestuous, and therefore that the petitioner and respondent were incapable of contracting a valid marriage either in Portugal or elsewhere.

July 5, 1876. *Inderwick*, Q.C., *Dr. Tristram*, and *Bayford*, appeared for the petitioner.

Feb. 27. *Willis*, Q.C., and *Jacques*, for the Queen's Proctor.

[The cases referred to were *Dalrymple v. Dalrymple* (¹); *Harford v. Morris* (²); *Countess of Portsmouth v. Earl of Portsmouth* (³); *Hall v. Hall* (⁴); *Compton v. Bearcroft* (⁵);

(¹) 2 Hagg. Cons., 54, 104.

(²) 2 Hagg. Cons., 423.

(³) 1 Hagg. Eccl., 355.

(⁴) 15 Jur., 710.

(⁵) 2 Hagg. Cons., 444 n.

Steele v. Braddell ⁽¹⁾; *Mette v. Mette* ⁽²⁾; *Simonin v. Mal-lac* ⁽³⁾; *Brook v. Brook* ⁽⁴⁾.

Cur. adv. vult.

March 17. SIR R. PHILLIMORE: The marriage in this case took place on the 21st of June, 1866, at the registrar's office in the city of London district, between Gonzalo Lobo Pereira Caldos de Barros the younger, and Ignacia Clara Maxima Pacheco Pereira Pamplona da Cunha Sottomayor. On the 18th of November, 1874, the wife filed a petition praying that the marriage might be decreed null and void by reason of consanguinity between the parties. On the 5th of July, 1876, the case came before the court for hearing. A witness was examined orally, and the evidence of witnesses taken under a commission was read. An appearance had been entered on behalf of the respondent, but he had not pleaded, and counsel were heard on behalf of the petitioner only. Taking into consideration the peculiar circumstances of the case, which I am about to state, I thought it *expedient that [85 the averments in the petition should be enlarged so as to enable the court to consider whether there was not ground for a decree of nullity, first, by reason of the incapacity of the parties to contract marriage in 1866; secondly, by reason of fraud, as shown by the evidence already laid before the court; and, thirdly, by reason of the petitioner's want of intention to contract a marriage, and of her ignorance of the effect of the ceremony, as shown by the evidence before the court. The amended petition has been duly served upon the respondent, and I, moreover, thought it right that Her Majesty's Proctor should be requested to intervene in this case; and I have reheard it, with the advantage of an able argument of Mr. Willis, who represented the Queen's Proctor.

At the time of the marriage the wife was of the age of fourteen years and five months, and the husband of the age of sixteen years. Their parents, who came to this country in 1858, were Portuguese subjects, and had not, in my judgment, looking to all the circumstances of the case, lost their original Portuguese domicile. The parties to the marriage were first cousins. The father of the lady was insane. The marriage was promoted by her mother and by her uncle, the father of her husband. It was presumed, erroneously as it turned out, that the marriage would have the effect of relieving the commercial property of the insane

⁽¹⁾ Milw. Ir. Eccl. Rep., 21.

⁽³⁾ 2 Sw. & Tr., 67; 29 L. J. (P. M.

⁽²⁾ 1 Sw. & Tr., 416; 28 L. J. (P. M. & A.), 97.

A.), 117.

⁽⁴⁾ 9 H. L. C., 217.

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father from certain pecuniary embarrassments. The girl most reluctantly consented to the marriage, yielding at last to the entreaties of her mother, and the assurances that the marriage, being contracted before a civil officer in England, and being illegal by reason of consanguinity in Portugal, would have no binding effect. The marriage was never consummated, and the parties lived exactly in the same relations and without any change of name, or any cohabitation whatever, as they had done before the marriage was contracted. The mother returned to Portugal towards the end of the year 1872, and was joined by her daughter in January, 1873, who is now dwelling in her parents' house in Lisbon.

Looking at all these circumstances, I think it is not improper to say that this is a marriage which the court would not be reluctant to pronounce invalid, but I must be on 86] my guard against *taking any other view than a strictly legal one of the unfortunate relationship in which these parties have been placed by their own acts. The boy and girl were both of marriageable age by the law of this country, and, I believe, also by that of Portugal. I am satisfied on the evidence that the marriage was not brought about by what the law would consider coercion of the girl's mother or her relations; and that she perfectly understood that she was about to contract a marriage appears from the great reluctance and distress with which she alleges she consented to it; nor can it vitiate the contract that she had an erroneous view of its future consequences. It cannot, therefore, be set aside on the ground of incapacity of age or coercion or fraud, and this, I may say, was at the last hearing admitted by her counsel.

There remains a very serious question, and one in some measure *primæ impressionis*, namely, whether the marriage can be pronounced invalid in *foro contractus*, that is, in an English court by reason of its being treated by the law of the domicile of the parties as void on the ground of their consanguinity. The Portuguese advocate who has been examined says that the marriage was null and void, because, according to the laws in force in Portugal at the time of the said marriage and now, first cousins are incapable of contracting marriage on account of consanguinity, and any such marriage is holden by the said law of Portugal to be incestuous, and therefore, that the petitioner and respondent were incapable of contracting a valid marriage, whether in Portugal or elsewhere. I must add to this statement of the law that which is a matter *publici juris* (so to speak),

namely, that marriages between first cousins in Roman Catholic countries are capable of being, and not unfrequently are, rendered valid by a papal or episcopal dispensation. This marriage cannot be pronounced invalid because it is incestuous according to the general law of Christendom; it is not a marriage between persons in the direct lineal line of consanguinity, or in the collateral line within the degree of brother and sister, both which classes of marriage are by the usage and practice of Christian states, and the general current of Christian law and authority, considered as incestuous, unnatural, and destructive of civilized life (Story, Conflict of Laws, § 114), and so considered by laws "*quæ humano generi universo sunt datae*" (Grotius de *Bello [87 et Pace, l. 2, c. 5, s. 13, § 2). I must also bear in mind the observations of Lord Cranworth in *Brook v. Brook* (¹). The prohibition of marriage between first cousins cannot be put upon this basis, or upon higher ground than that of a prohibition by the positive law of the country of the domicile. The objection of consanguinity in this case, being removable by a papal or episcopal dispensation, is of the nature of what the canonists call an *impedimentum impeditivum*, and not an *impedimentum dirimens*.

I have considered all the judgments which have been given in this country upon the much vexed subject of foreign marriages. The decided cases establish the doctrine that the court of the domicile recognizes certain incapacities, affixed by the law of the domicile, as invalidating a marriage between parties belonging to that domicile in a foreign state in which such marriage is lawful. But the decided cases do not establish the converse doctrine that the court of the place of the contract of marriage is bound to recognize the incapacities affixed by the law of the domicile on the parties to the contract, when those incapacities do not exist according to the *lex loci contractus*. It may appear that according to the *jus gentium* the latter proposition is a consequence of the former; and I remember addressing such an argument to the full Court of Divorce in the case of *Simonin v. Mallac* (²), but in vain. In that case the parties were French subjects, and came to England for the purpose of evading the French law, and having been married by licence, returned to Paris the day after the marriage. A French tribunal pronounced a decree of nullity against the marriage, on the ground that it had been celebrated without the consent of parents, and without the precedent publications required by the code. Application was made to the

(¹) 9 H. L. C., 226.

(²) 2 Sw. & Tr., 67; 29 L. J. (P. M. & A.), 97.

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English court to pronounce a decree of nullity on the ground of the incapacity of the parties according to the law of their origin and domicile, and this appeared to me to be a case in which the English tribunal, according to the *jus gentium*, ought to respect the French law, and also pronounce a decree of nullity, but it refused to do so in a very elaborate and careful judgment delivered by Sir C. Cresswell on behalf of the full court. It was a case *primæ impressionis*. The court said (p. 80), "It is very remarkable that neither in 88] the *writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnized in conformity with the laws of that country should hold it void, because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed. No such argument has been advanced even in the case of marriages deemed to be incestuous." It was, I think, not quite correct to say "that no suggestion was offered," but in other respects the statement is perfectly accurate. The court then relied a good deal upon the authority of Huber (*Prælectiones Juris Civilis*, lib. i, tit. 3 *De conflictu legum*) for the general law that marriages valid according to the *lex loci contractus* are valid everywhere, though the same writer (as they were aware, for they cited the passage) excepted from the operation of this principle incestuous marriages, and marriages by minors, and thought that other nations ought to refuse to acknowledge the validity of such marriages. "Multoque magis statuendum est, eos contra jus gentium facere videri, qui civibus alieni imperii suâ facilitate jus patriæ legibus contrarium scientes volentes impertiuntur."

It is true that in that case the objection to the marriage was of a very different character from what is presented in the case before me, and that Lord Campbell, when the case of *Brook v. Brook* ⁽¹⁾ was argued before the House of Lords, dwelt strongly on the fact that the objections in *Simonin v. Mallac* ⁽²⁾, derived from the French law, related to matters of form. After mentioning the facts of the case, that learned lord said: "Sir C. Cresswell, after the case had been learnedly argued on both sides, discharged the petition. But was there here anything inconsistent with the opinion which the same learned judge delivered as assessor to Vice-Chancellor Stuart in *Brook v. Brook* ⁽³⁾? Nothing whatever, for the objection

⁽¹⁾ 9 H. L. C. 217.

⁽²⁾ 2 Sw. & Tr., 67; 29 L. J. (P. M. & A.), 97.

⁽³⁾ 3 Sm. & G., 481.

to the validity of the marriage in England was merely that the forms prescribed by the Code Napoléon for the celebration of a marriage in France had not been observed. But there was no law of France, where the parties were domiciled, *forbidding a conjugal union between them, and [89 if the proper forms of celebration had been observed, the marriage, by the law of France, would have been unimpeachable. The case, therefore, comes into the same category as *Compton v. Bearcroft* ⁽¹⁾ and *Steele v. Braddell*, decided by Dr. Radcliffe ⁽²⁾. None of those cases can show the validity of a marriage which the law of the domicile of the parties condemns as incestuous, and which could not by any forms or consents have been rendered valid in the country in which the parties were domiciled." These are certainly strong *dicta* from a high authority, from which an inference might be drawn that in the case of a marriage incestuous by the laws of the domicile, the court of the *loci contractus* might, in the opinion of Lord Campbell, be justified in setting aside the marriage on the ground of the incapacity of the parties to contract it.

If this important question were not embarrassed by precedents of former decisions, and especially by the judgment on *Simonin v. Mallac* ⁽³⁾, I might have been inclined to hold that the *jus gentium* would require the *lex fori*, which is also the *lex loci contractus*, to adopt for the occasion as its own law the *lex domicilii*, as in an analogous case, that of *Dalrymple v. Dalrymple* ⁽⁴⁾, Lord Stowell speaks of the law of England, withdrawing altogether and leaving the legal question to the exclusive judgment of the law of the foreign country. But having regard to the decisions upon this subject, and especially to that of *Simonin v. Mallac* ⁽³⁾, I do not think that sitting as a single judge in an English court, I ought to pronounce this marriage contracted in England, and valid by English law, to be null, and I must decline to do so. I dismiss the petition.

Solicitors for petitioner: *Tamplin, Taylor & Joseph.*

Solicitor for respondent: *J. P. Poncione.*

⁽¹⁾ 2 Hagg. Cons., 444, n.

⁽³⁾ 2 Sw. & Tr., 67; 29 L. J. (P. M. & A.), 97.

⁽²⁾ Milw. Ir. Eccl. Reps., 21.

⁽⁴⁾ 2 Hagg. Cons., 54.

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Sly v. Sly.

[2 Probate Division, 91.]

Feb. 6, 1877.

91]

*SLY V. SLY and DREDGE.

Lost Will—Copy—Evidence.

Declarations of a deceased person, who has been in possession of property claiming a limited interest therein under a particular will, are admissible to prove the fact that such will had a legal existence, and also that certain persons were named executors therein. And where a copy of such will, the original not being forthcoming, is found in the possession or amongst the papers of the legal adviser of one of such executors, it is evidence of the contents of such will, and may be admitted as such.

THE plaintiff, Elizabeth Sly, as the universal legatee substituted in the last will and testament of Mary Sly, deceased, propounded a copy of such will, which was dated July, 1826, and in which Richard Howe and John Daniel were appointed executors. The defendants, the parties interested under an intestacy, did not appear or contest the suit.

Jan. 11. *Inderwick*, Q.C., and *Searle*, appeared for the plaintiff.

Cur. adv. vult.

Feb. 6. SIR J. HANNEN (President): In this case Elizabeth Sly propounded the will of Mary Sly, deceased, alleged to have been duly executed and attested in July, 1826, whereby the deceased appointed Richard Howe and John 92] Daniel executors. *Elizabeth Sly, the plaintiff, claimed to be the universal legatee substituted in the said will of Mary Sly, and to have administration granted to her, with a copy of the said will annexed, the original having been lost. It was proved that William Dredge, the father of one of the defendants, was in possession of property which formerly belonged to the deceased, and that in the year 1836 he, with his wife Mary Dredge, joined in a deed by which a loan was raised upon the security of Mary Dredge's life interest in the property in question, stated in the deed to be derived from the will of Mary Sly, deceased, of which Richard Howe and John Daniel were executors. The defendant Dredge had remained in possession of the property after the death of his father and mother. The original will was never proved, nor could it be found after due search made for it, but a document purporting to be a copy was offered in evidence, and the question is, whether it is admissible. The copy was found amongst the papers of a Mr. Goodman, a solicitor, deceased, of whom John Daniel also deceased was a client. It was in a bundle of papers relating to Daniel's affairs, one

of them being a memorandum apparently of answers made in February, 1838, by Daniel to inquiries concerning various documents. One entry in the memorandum in the handwriting of Daniel was as follows: "1826. The will of Mary Sly?—Yes." The books of Goodman could not be found, he having become a bankrupt, and many of his papers having been burnt. The copy will was traced to the custody of Mr. Goodman's assignees. The copy is in the handwriting of one John Symes, deceased, who was formerly a clerk in the employment of Goodman, and is indorsed "Copy will of Mary Sly," and John Symes' name appears in the copy as that of one of the attesting witnesses. The other attesting witness cannot be found. The solicitor who prepared the deed of 1836 stated that he has no doubt that he saw the original will at the time, though he does not recollect its contents.

In these circumstances I am of opinion that the alleged copy is admissible in evidence. The statement contained in the deed of 1836, being one made by a deceased person in possession of the property, in disparagement of his own title by limiting it to a life estate, is admissible, not only as against persons claiming through him, but also for strangers; and the statement that he took the *life interest under [93 a particular will seems one equally admissible, for it is a further limitation of his interest. It is as though the declarant had said, "I claim no other interest than the life estate which I can show I take under the will of Mary Sly." The case is similar to that of an occupier of land whose declaration has been received to show the name of the landlord under whom he held: *Peaceable v. Watson* ('). This evidence, therefore, establishes that there was a will of Mary Sly, of which Richard Howe and John Daniel were executors. This at once points to Daniel's custody as a proper quarter in which to seek for a copy of the will of the deceased, search having been made in vain for the original in every place that can be suggested for its proper or probable place of deposit. It would be natural and reasonable that a copy should be made for the executor, and that it should be preserved and kept by his solicitor for the client's use and guidance (the original probably having been retained by the tenant for life as evidence of his interest in the realty). With regard to the copy tendered in evidence, it is accompanied by every mark of authenticity; it is made by a person who represents himself to have been one of the attesting witnesses; it is made by an attorney's clerk, presumably

(') 4 Taunt., 16.

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in the course of his business as such clerk, since it is found in his employer's custody amongst his client's papers after a lapse of fifty years. It may be added that another copy, indorsed with the name of Mr. Goodman's firm, was also found in the custody of the heir of the person taking, in the events which have happened, the reversion in the property left by the will to Ann Dredge for life; but this, though it corroborates the evidence afforded by the copy found amongst the papers of Mr. Daniel, does not affect the question of its admissibility. I pronounce for the will as contained in the draft or copy filed by the plaintiff on the 15th of May, 1875.

Solicitors: *Taylor, Hoare & Co.*

See 17 Eng. Rep., 543 note.

Where a will is proved to have been in existence at the death of a testator, and is afterwards lost or destroyed, its contents may be proved by parol and admitted to probate.

Where a will which was always in the custody of the testator cannot be found after his death, the presumption is that he destroyed it *animo revocandi*; but this presumption may be rebutted by competent evidence.

F. was known to have made several successive wills, and to have declared the necessity of having one in force at the time of his death. He spoke of the existence of one within two days of his death, at which time he was too feeble to leave his bed without assistance. He soon afterward became unconscious, and so remained until he died. No positive evidence of a revocation was adduced: Held, that the presumption of revocation was rebutted, and that, not being found, a copy of the contents, as proved by parol, was properly admitted to probate: *Foster's Appeal*, 5 Weekly Notes Cases (Penn.), 413; S. C. below, 34 Leg. Int., 222.

See *Patten v. Poulton*, 1 Swabey & Tristram, 55.

As to declarations of a testator on the question of revocation of a will, see 3 Amer. Dec., 395, 397 note; *Miller v. Phillips*, 9 R. I., 141; *Whiteley v. King*, 17 C. B., N.S., 756; *DeGroff v. Ter-*

penning, 14 Hun, 301; *Spoonmore v. Cables*, 66 Missouri, 579.

As to such declarations on the question of undue influence, see *Cudney v. Cudney*, 68 N. Y., 148, 3 Am. Dec., 396 note; *Spoonmore v. Cables*, 66 Mo., 579.

The defendant testified that her husband had access to a drawer in which she had last seen a certain paper. He was not called on to show that he destroyed the paper, nor was its loss otherwise accounted for. Held insufficient evidence of loss to admit secondary evidence of the contents of the paper.

Where it appears that the party offering parol evidence of the contents of a written instrument would have an interest in getting rid of the original, in order to introduce secondary evidence of its contents, the clearest proof of loss is required: *People v. Lord*, 67 Barb., 110.

Where a person is assumed to have been insane at the time of placing a will among his valuable papers, it will require an equally intelligent act of retaining it in such repository, in a lucid interval, to give it effect as a valid disposition of his property, this being equivalent to a publication; but to say that if he was at any time of sound mind and memory, and then retained it among his valuable papers, it would be conclusive that he intended it to be his will, is to state the rule too strongly: *Porter v. Campell*, 58 Tenn. (2 Baxter), 81.

[2 Probate Division, 94.]

Feb. 20, 1877.

*In the Goods of LACROIX.

[94

Holograph Will—Valid according to the Law of the Place where made—Incorporation—
24 & 25 Vict. c. 114, s. 1.

The deceased, a Frenchman by birth, but naturalized in England, executed at Paris a will and codicil in the English form relating to his property in England only, and a holograph will, signed and dated, disposing of his property in France, but referring directly to the English will. He died at Paris:

Held, that if it could be shown that the will and codicil in the English form were made in a form permitted by the law of France in the case of British subjects resident in France, they could be admitted to probate under 24 & 25 Vict. c. 114, s. 1, as valid according to the law of the place where made.

EUGÈNE LEGUEN DE LACROIX, a natural born French subject, died at Paris on the 15th of April, 1876. On the 9th of October, 1845, he obtained a certificate of naturalization in this country, which was duly enrolled in the High Court of Chancery in accordance with the provisions of the statute 7 & 8 Vict. c. 66, under which the certificate was granted. He subsequently returned to France, and in the year 1874, being at the time resident at Paris, he executed a will bearing date the 4th of June, 1874, in the English form, and attested as required by the English law, and two codicils dated respectively the 9th and 15th of June, 1874. By these testamentary papers he disposed of his property in England only. On the 26th of December, 1874, being still resident in Paris, he made a holograph will in the French form and language, of which the following is a translation: "Desirous of acknowledging the great kindness my wife, Jenny Louise Blackner, has shown me, especially since my said illness, I bequeath in her favor, and give her the enjoyment for life of my moiety of our house in the Rue Duperre, at St. Servan, as well as the furniture, plate, linen, pictures, carriages, horses, wine-cellar, and generally of all the furniture and everything contained in or about the same, so that she may live therein peacefully, and without being troubled or disturbed; this she will be enabled to do with the share I have given her out of my property in England by my wills of the 4th, 9th, and 15th of June, 1874. May God protect her in this world, as also my son Eugène, even as I bless them on leaving it.

(Signed)

"Eugène Leguen de Lacroix.

"Paris, 26th day of December, 1874."

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95] *According to the affidavit of an advocate of the Court of Appeal of Paris, it would seem that the English will and codicils would be upheld and carried into execution by the courts in France, as being the will and codicils of an English subject made in accordance with the requirements of the law of his nationality, and that the will in the French language dated the 26th of December, 1874, is made in conformity with and is valid by the laws and constitution of the French Republic.

Feb. 6. *Searle* moved for probate of the holograph will, as also of the English will and codicils. Under the statute 24 & 25 Vict. c. 114, s. 1, the holograph will is well executed according to the forms required by the laws of the place where the same was made; and as it contains a direct reference to the English will and codicils, it incorporates them, and the whole will be admitted to probate.

[SIR J. HANNEN referred to the case of *Pechell v. Hilderley* (1), in which it was stated that a holograph will, under the Code Civil, must be a complete instrument in itself, and could not incorporate any other document.]

In that case the documents before the court were not valid either by the law of this country or by the law of Italy, where the one of later date was written. In this case the holograph will is valid by the law of France, and therefore is entitled to be admitted to probate in this country, and as it is incomplete without the English will and codicils, to which it distinctly refers, the court will grant probate of all these documents so that there may be a complete will.

Cur. adv. vult.

Feb. 20. SIR J. HANNEN (President): The deceased in this case, a naturalized British subject, made at Paris a will, dated the 4th of June, 1874. On the 9th of June, 1874, he executed a codicil to this will, and on the 15th of June, 1874, he made a second codicil, apparently for the sole purpose of correcting an omission in the first codicil. These three instruments were duly executed according to the requirements of the English law, or *rather, I should say, were executed in the form required for English wills. On the 26th of December, 1874, he also at Paris executed a holograph testamentary instrument in the French form, and by it he confirmed his will of the 4th, 9th, and 15th of June, 1874. Application was made to me to admit to probate all these several documents. It appears from the affidavit of a French advocate that the instruments of the 4th and 15th

(1) Law Rep., 1 P. & M., 673.

of June, 1874, are a good and valid will and codicil, which would be upheld and carried into execution by the French courts, as being the will and codicil of a British subject, made in accordance with the requirements of the law of his nationality. I have quoted the exact words of the affidavit. This assumes, however, that the will and codicil were made in accordance with the requirements of the law of England, but they were not so made unless they were made in the form required by the law of France, or unless they were made in the form required by the law of the place of the deceased's domicile at the time when made. It does not appear what the deceased's domicile was, but it is rather to be inferred it was French. It is possible, however, that the French advocate may mean that the will and codicil are made according to the form permitted by the law of France, in the case of a British subject making his will in France; and if evidence can be offered to the court that by the law of France it is permitted to a foreigner in France to make his will according to the form required by the law of his country as to the execution of wills there, and that a will so made would be deemed by the French courts to be good and valid, and would be carried into execution by them, this application may be renewed, as it would then appear that the will of the 4th of June, 1874, and the codicil of the 15th of June, 1874, were valid, as having been made in the form permitted by the law of France in the case of British subjects in France. The same advocate further deposed that the will of the 26th of December, 1874, is made in conformity with the requirements of the French law, and is valid by the laws of France. If the evidence I have suggested can be obtained, it will be open to the applicant to contend, and I think successfully, that all the documents referred to are made in accordance with the form required by the law of the place where they were made, and must therefore be held to be well executed *for the purpose of being [97 admitted to probate in England under 24 & 25 Vict. c. 114. The case of *Pechell v. Hilderley* (¹), to which I referred when the motion was made, is not an authority against my granting the application. That case turned on the application of Italian law to the instruments then in question. In the present case I must be guided by what may be shown by a competent person to be the French law, and it will be unnecessary to consider whether, if the law of France were proved to be similar to the law of Italy as stated in the evidence before the court in that case, it would prevent my

(¹) Law Rep., 1 P. & M., 673.

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granting the application. The case must stand over for further evidence.

April 10. *Searle* renewed the application on a further affidavit from the advocate of the Court of Appeal of Paris, to the following effect: (1.) That by the law of France a will of a naturalized British subject made in France according to the forms required by the law of England to give validity to wills executed by Englishmen in England is valid, and would be carried into execution by the French courts, whatever may be the domicile of the testator at the time of making such will, or at the time of his death. (2.) That, assuming the deceased *Lacroix*, being a Frenchman by birth, afterwards became a naturalized British subject, and subsequently to the date of such naturalization as a British subject returned to France, and in France executed a will according to the form required by the law of England to give validity to wills executed by Englishmen in England, such will is valid by the law of France, and would be carried into execution by the courts of France, whatever may have been the domicile of the deceased at the time of making the same, or at the time of his death.

SIR J. HANNEN (President) granted probate of the English will and codicil, bearing date, respectively, the 4th of June, 1874, and the 15th of June, 1874.

Solicitors: *Ridsdale, Craddock & Ridsdale*.

[2 Probate Division, 98.]

Feb. 20, 1877.

98] *DEMPSEY V. LAWSON and LAWSON.

Will—No Residuary nor Revocatory Clauses—Earlier Will disposing of the whole of the Property—Incorporation.

The deceased executed a will in 1858, by which she disposed of the whole of her property. In 1860 she executed another will, which commenced "this is the last will and testament of me," &c. It varied and repeated various bequests given in the first will, appointed the same executors for England as in that document, but contained no residuary nor revocatory clauses:

Held, that, from the general tenor of the last will, it was clear that the testatrix did not intend the first will to remain in force, and that it therefore was revoked.

ELIZABETH, Baroness Stafford, late of Hornby Castle, Yorkshire, widow, died on the 29th of October, 1862. On the 26th of August, 1858, she duly executed a will, in which she appointed her nephew Charles Carroll McTavish, Oliver O'Donnell, and McHenry, grandson of Colonel J. E. Howard, executors as to her real estate and ground rents in the

United States of America, and Sir William Lawson, Bart., John Lawson, and Thomas Paulinus Lawson, executors in this country. In this will the testatrix, after referring to the powers given to her under her grandfather's (Mr. Carroll, of Carrollton, in the United States) will, and that of her mother, Mrs. Caton, of Maryland, and expressing her desire to execute the powers so vested in her, and to dispose of all her real and personal estate and property whatsoever and wheresoever, proceeds to dispose of certain portion of her real estate in America in favor of some Roman Catholic ecclesiastics and institutions, and the remainder of such estates she bequeaths, through the medium of trustees, for the benefit of her sister, the Duchess of Leeds, and Mrs. McTavish, and for the children of the latter. She then leaves all her personal estate, not otherwise bequeathed, to Sir William Lawson, of Brough Hall, Yorkshire, and to his sons John Lawson and Thomas Paulinus Lawson, their executors, administrators, and assigns, in trust to pay debts, funeral and testamentary expenses, and to appropriate out of such parts of her residuary personal estate as may by law be applied to charitable purposes, such stocks, funds, securities, shares, or other property as will yield an income sufficient for paying a perpetual *annuity of £100 to [99 the Right Reverend Thomas Grant, D.D., of St. George's Roman Catholic Church, Southwark, Roman Catholic bishop, and his successors, Roman Catholic bishops, performing the duties or chief duties now performed by the said Thomas Grant as such Roman Catholic bishop, and to vary the investments from time to time with the consents of the said Dr. Grant and his successors, and to pay the dividends, &c., to the said Dr. Grant and his successors forever, for his and their support and maintenance. In the third place, to appropriate out of the residuary personal estate such stocks, &c., as will yield an income sufficient for paying the several annuities set out in the will, annuities principally to old servants of her own or her sister's. In the fourth place, to raise a clear legacy or sum of £3,000 at the expiration of six months from her decease, and to pay the same to her step-son Lord Stafford. Lastly, to continue the clear surplus of the residuary personal estate in its actual state of investment, or to alter or vary the same with the consent of the Duchess of Leeds during her life, and afterwards in the absolute discretion of the trustees, and to pay the interest, dividends, and annual produce arising from the same, as well as the surplus of the interest, dividends, and annual produce to arise from the stocks, &c., before directed to be

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appropriated for the purpose of meeting the several annuities before mentioned, after paying such annuities, to her sister, the Duchess of Leeds, for her separate use, and after her decease to her sister, Mrs. McTavish, for her life, and after the death of the survivor upon trust as to such portions of the said residuary personal estate as may by law be bequeathed to charitable purposes, and the stocks, funds, and securities upon which the same may have been invested upon trust as to one third part thereof to pay or assign, transfer and apply the same to or for the benefit of the Roman Catholic Convent of the Sisters of Mercy at Bermondsey, in the county of Surrey, forever, and as to one other third part thereof, to pay, assign, transfer and apply the same to or for the benefit of the Roman Catholic Convent of , at Richmond, in the county of York, forever, and as to the remaining third part thereof, to pay, assign, transfer, and apply the same to or for the benefit of the Roman Catholic Convent of the Annunciation, called the Sisters of the Good Shepherd, at Hammersmith, [100] *in the county of Middlesex, forever, for the respective charitable purposes of the said institutions respectively. And as to any parts of the said residuary personal estate which could not by law be bequeathed to charitable purposes, and also as to any part of the residuary estate before bequeathed the trusts of which shall on any account fail or be or become invalid or incapable of taking effect, the testatrix gave the same to her sisters, their heirs, executors, and assigns, for their use and benefit as joint tenants, and as to the Duchess of Leeds for her separate use.

On the 5th of December, 1860, the testatrix executed another will, which commenced, "In the name of God. Amen. This is the last will and testament of me, Elizabeth Stafford, the widow of George William, Lord Stafford, a peer of Great Britain, and one of the daughters of Richard and Mary Caton, of Baltimore, in Maryland, in the United States of America, now residing in London." By this will she gave to Basil R. Spalding, Esq., of Charles Street, in the city of Baltimore, in the state of Maryland, all her lands, ground rents, and real estate in the United States of America, whatsoever, wheresoever, and howsoever, in trust for the benefit of her sisters, the Duchess of Leeds, and Mrs. McTavish, and the two sons of the latter and their children. The bequests to charitable institutions in America contained in the first will were omitted, and certain annuities made payable out of ground rents in the city of Baltimore in the first will were charged on her farms and lands in Frederick

county, Maryland, by this last will. Mr. Spalding is appointed executor for all matters and things in the United States of America. The testatrix then continues: "I give and bequeath to Sir William Lawson, Bart., and his two sons, John and Thomas Lawson, all my Baltimore and Ohio Railroad shares, all my Spanish stocks and certificates, and all other shares and stocks I may be possessed of or entitled to at the time of my death, whatsoever, wheresoever, and howsoever in trust for the following purposes:" (namely, to pay debts, testamentary and funeral expenses, a sum of £3,000 to her step-son, the present Lord Stafford, and certain annuities therein mentioned). "All the residue of income from the above stocks and shares, after paying the annuities above mentioned, I bequeath equally between my two sisters, the Duchess of Leeds and Mrs. Emily McTavish, *during their lives. If the Duchess survives Mrs. [101 McTavish, then I give to her the whole income for her life. At the death of both my sisters I leave one half of all the said stocks and shares whatsoever and wheresoever to the children of Charles Carroll McTavish, my nephew. I leave the portions of the female children to their sole and separate use, free from the control of their husbands and liability for their debts, and the shares of the sons to be given to them on their attaining the age of twenty-one. The other half the said stocks and shares I request Sir William and his sons to hold for the following charities, or to secure the funds to them for the use of his country; and not to be diverted to any foreign charitable institutions. I request my trustees to appropriate one fourth of the above sum to the establishment of the order of the Sisters of Charity in London in concert with Lady Georgiana Fullarton, if she be living, or to the establishment she shall have founded; one fourth to the Good Shepherd at Hammersmith; one fourth to the Priory of Our Lady of Peace at Richmond, in Yorkshire; one eighth to a fund for aged and infirm Roman Catholic priests in England, and one eighth for the education of poor Roman Catholic children. I appoint Sir William Lawson, and his son John Lawson, Esq., and Thomas Lawson, Esq., executors of this my last will and testament for all matters and things in England, and in respect of all my shares, funds, and stocks, &c., wheresoever and howsoever."

On the 18th of June, 1862, the testatrix executed a codicil to this last will, and thereby confirmed it. On the 24th of March, 1863, probate of this will and codicil was granted to Sir William Lawson, Bart. (since deceased), and his two

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sons, John and Thomas Paulinus Lawson, the executors therein named; and on the 10th of January, 1876, a writ of summons was taken out by the plaintiff, Catherine Anne Dempsey, the superioress of the Roman Catholic Convent of the Sisters of Mercy at Bermondsey, one of the residuary legatees named in the will of the deceased, dated the 26th of August, 1858, calling upon the defendants to bring in the probate of the will and codicil of the deceased granted to them on the 24th of March, 1863, in order to its being revoked, and claiming that probate be granted of the will of the 26th of August, 1858, together with the will of the 5th of December, 1860, and the codicil thereto, dated the 18th [102] of June, 1862, as *forming together the last will and testament of the deceased. A statement of claim was subsequently filed by the plaintiff, propounding these several papers, and the defendants filed a statement of defence, alleging that the will of the 26th of August, 1858, was revoked by the execution of the subsequent will of the 5th of December, 1860, and that that will and its codicil are alone entitled to be admitted to probate. Issue having been joined, the question in dispute came on for decision before the president, without a jury. At the hearing it was proved that at the death of Lady Stafford a sum of £8,987 4s. 6d. stood to her credit at Messrs. Rothschild's, being the proceeds of the sale of some Spanish certificates sold by her directions on the 30th of June, 1862, and further sums of £438 16s. 8d. and £187 4s. 6d. at other banks, and also that a sum of £50 12s. 2d. was due to her at the time of her death in respect of her jointure. These several sums were not disposed of by the will and codicil, which had been proved by the defendants.

Jan. 11. *Inderwick*, Q.C., and *Searle*, appeared for the plaintiff: As there is no clause of revocation in the will of December, 1860, and the residue is not disposed of by that will, there is no reason why the will of August, 1858, should not be included in the probate. If the earlier will is revoked the deceased died intestate as to a considerable portion of her personal estate.

Dr. Spinks, Q.C., *Bayford*, and *Williamson*, for the defendants: It is clear from the contents of the will of December, 1860, that the testatrix intended thereby to revoke the earlier will. The court cannot insert a revocatory clause in a will, neither can it introduce a clause disposing of the general residue.

[The cases referred to were: *In the Goods of Leese* ('); *In*

(') 2 Sw. & Tr., 442.

the Goods of Graham ⁽¹⁾; *Geaves v. Price* ⁽²⁾; *Birks v. Birks* ⁽³⁾; *In the Goods of Meredith* ⁽⁴⁾; *In the Goods of Joys* ⁽⁵⁾; *Lemage v. Goodban* ⁽⁶⁾; *In the Goods of Fenwick* ⁽⁷⁾; *In the Goods of Griffith* ⁽⁸⁾; *In the Goods of Petchell* ⁽⁹⁾.]

Cur. adv. vult.

*Feb. 20. SIR J. HANNEN (President): The testatrix, Elizabeth, Baroness Stafford, died on the 29th of October, 1862, and on the 24th of March, 1863, her will, bearing date the 5th of December, 1860, and a codicil thereto, dated the 18th of June, 1862, were proved in common form. In January, 1876, this action was commenced in which the plaintiff propounds an earlier will of the 26th of August, 1858, wherein the testatrix appointed the Roman Catholic Convent of the Sisters of Mercy, at Bermondsey, one of the residuary legatees, of which convent the plaintiff is superior; and she claims that probate be granted of the said will with that of December, 1860, together with the codicil of June, 1862, as forming together the last will and testament of the deceased. By the will of 1858 the testatrix, after disposing of certain real and personal property in the United States, bequeaths all her personal estate, not before bequeathed, to Sir W. Lawson and his sons John and Thomas, in trust, first to pay debts, funeral and testamentary expenses; secondly, to pay a perpetual annuity of £100 a year to Dr. Grant and his successors, Roman Catholic bishops; thirdly, to pay certain annuities in the will mentioned; fourthly, to raise and pay a sum of £3,000 to her step-son Lord Stafford; fifthly, to pay the interest arising from the residue to her sister the Duchess of Leeds for life, and after her decease to her sister Emily McTavish for life; and after the death of the survivor, as to one third, to apply the same for the benefit of the Roman Catholic Convent of the Sisters of Mercy, at Bermondsey, forever; as to one other third part, for the benefit of the Roman Catholic Convent of, at Richmond, in Yorkshire; and as to the remaining third, for the benefit of the Roman Catholic Convent of the Good Shepherd, at Hammersmith; and as to any parts of her residuary estate which could not by law

⁽¹⁾ 3 Sw. & Tr., 69; 32 L. J. (P. M. & A.), 113.

⁽²⁾ 3 Sw. & Tr., 71; 32 L. J. (P. M. & A.), 113.

⁽³⁾ 4 Sw. & Tr., 23; 34 L. J. (P. M. & A.), 90.

⁽⁴⁾ 29 L. J. (P. M. & A.), 155.

⁽⁵⁾ 30 L. J. (P. M. & A.), 169.

⁽⁶⁾ Law Rep., 1 P. & M., 57.

⁽⁷⁾ Law Rep., 1 P. & M., 319.

⁽⁸⁾ Law Rep., 2 P. & M., 457.

⁽⁹⁾ Law Rep., 3 P. & M., 153.

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be bequeathed to charitable purposes, or as to which her bequests might fail, she bequeathed the same to the Duchess of Leeds and Mrs. McTavish absolutely as joint tenants. Lastly, the testatrix left a legacy of £300 to Sir W. Lawson, and appointed him and his two sons executors. By the will of 1860 the testatrix devised to Basil R. Spalding, Esq., of Baltimore, "all her real estate in the United States of America whatsoever, wheresoever and howsoever in trust;" as to certain lands, for the use and benefit of her sister the [104] Duchess of Leeds; *and various other devises and bequests follow, varying some of the dispositions of the will of 1858 as to the American property, and repeating others, but not mentioning by description all the estates referred to in that will. After appointing Basil R. Spalding executor of her will in all matters and things in the United States of America, the testatrix proceeds as follows: "I give and bequeath to Sir W. Lawson (and his two sons John and Thomas) all my Baltimore and Ohio Railroad shares, all my Spanish stocks and certificates, and all other shares and stocks I may be possessed of or entitled to at the time of my death, whatsoever, wheresoever, and howsoever, in trust for the following purposes": (1st,) to pay debts, &c.; (2dly,) to raise and pay to Lord Stafford £3,000; (3dly,) to pay the annuities mentioned in the will, most of them being to the same persons and for the same amounts as in the will of 1858, and, subject thereto, to divide the income between the Duchess of Leeds and Mrs. McTavish, and, at the death of one of them, to pay the whole to the survivor, and, at the death of the survivor one half of the said stocks and shares, whatsoever and wheresoever, to the children of Charles C. McTavish, her nephew, and the other half she requested Sir W. Lawson and his sons to hold for the following charities: one fourth to the establishment of the order of the Sisters of Charity, in London, in connection with Lady G. Fullarton, if she be living; or to the establishment she shall have founded; one fourth to the Good Shepherd Convent at Hammersmith; one fourth to the Priory of Our Lady of Peace, at Richmond; one eighth to the fund for aged and infirm Roman Catholic priests; and one eighth for the education of poor Roman Catholic children. And the will concludes: "I appoint Sir W. Lawson and his sons John and Thomas executors of this my last will and testament for all matters and things in England, and in respect of all my shares, funds and stocks, &c., wheresoever and howsoever."

At the death of Lady Stafford a sum of £8,987 4s. 6d.

stood to her credit at Messrs. Rothchild's, being the proceeds of the sale of some of the Spanish certificates which she held at the date of the will of 1860, and which by her direction had been sold on the 30th of June, 1862. She had not, at the time of her death, given any direction as to the reinvestment of this money. Beyond this *amount, [105 Lady Stafford died possessed of two balances at her bankers of £438 16s. 8d. and £187 4s. 6d. respectively, and £50 due to her in respect of her jointure. The executors and trustees under the deceased's will appear to have acted on the assumption that she died intestate in respect of these several sums; but it is now contended on the part of the plaintiff, that the assumption was incorrect, and that the money in the hands of Messrs. Rothchild and the bankers, and the arrears of the jointure passed under the residuary clause of the will of 1858, on the ground that that clause is not revoked by the will of 1860. Hence this action. It was contended on behalf of the plaintiff, that as the will of 1860 contains no express revocation of the earlier will it was to be construed as revoking only those parts of it with which the later provisions were inconsistent, and that the dispositions of the will of 1860 are not inconsistent with the residuary bequest for the benefit of the three Roman Catholic convents. In support of this contention, Williams on Executors, 6th ed., p. 150, and the cases there cited, were relied on. I assent to the principle expressed in the passage referred to, and I have had occasion to act upon it in the case of *In the Goods of Petchell* ⁽¹⁾, but it becomes necessary on the present occasion to consider more minutely the nature and extent of the inconsistency of a later testamentary instrument, which will have the effect of revoking an earlier will. In this investigation the court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in that language has to be ascertained by reference to the facts in connection with which it was used; but in seeking the true meaning of the testator, the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later will does not completely cover the whole subject-matter of the earlier. This is what was decided in *Plenty v. West* ⁽²⁾. There the court held upon

⁽¹⁾ Law Rep., 3 P. & M., 153.

⁽²⁾ 1 Roberts. Eccl., 264.

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all the facts before it, that it was the intention of the testator that the later paper should stand alone, *although that disposed of a part only of his personal estate, and therefore that in effect, although not in terms, it revoked the earlier will. The authority of that case has been stated by Sir E. V. Williams to be doubtful since the decision of the Privy Council in *Cutto v. Gilbert* (¹), and Lord Penzance is said to have regarded it as overruled. The case of *Cutto v. Gilbert* (¹), however, merely decides that the bare fact of a testator having executed an instrument as his last will and testament, the contents of which are unknown, does not operate as a revocation of a previous will, and this seems very obvious for the missing instrument may have been confirmatory of the first (see *Wms. Executors*, p. 156, note c). It certainly does not appear from the judgment in that case, that there was any intention to overrule the decision in *Plenty v. West* (²). Dr Lushington (³) says: "Upon this case we will first observe that the two wills were essentially different, that no executors were appointed by the first, that executors were appointed by the second, and that the only ground of argument for the uniting the papers was, that the whole of the personal estate was not disposed of by the second will. It is true that Sir H. J. Fust, in his judgment, relies upon the fact that the testator called the will of 1838 his last will, but that is only one circumstance in conjunction with others on which he founded his decision." The Judicial Committee thus appear to have approved of the decision in *Plenty v. West* (²) upon the ground that the fact that the whole of the personal estate was not disposed of by the second will, was not by itself a sufficient reason for uniting the earlier with the later will, and admitting both to probate, the wills being in other respects essentially different. And Lord Penzance, in *Lemage v. Goodban* (⁴), does not say that *Plenty v. West* (²) is overruled; but with his accustomed accuracy, only says, "the case of *Plenty v. West* (²), so far as it supports the doctrine that the use of the words 'last will' in a testamentary paper necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto v. Gilbert* (¹)." Lord Penzance further says: "The intention of the testator in the matter is the sole guide and control. But the intention to be sought and 107] discovered relates to the *dispositions of the testator's property and not to the form of his will. What dispositions did he intend? not which or what number of papers

(¹) 9 Moo. P. C., 131.

(²) 1 Roberts. Eccl., 264.

(³) 9 Moo. P. C., at p. 146.

(⁴) Law Rep., 1 P. & M., 57.

did he desire or expect to be admitted to probate? is the true question." I followed that decision *In the Goods of Petchell* ⁽¹⁾. In that case I considered that the intention of the testatrix in the second will was to benefit her daughter by postponing the payment of the specific legacies until after the daughter's death, and that no intention appeared to deprive her daughter of the residue after payment of the legacies. I therefore came to the conclusion that the original residuary bequest in her favor was not revoked.

Even if the second instrument contains a general revocatory clause, that is not conclusive, and the court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will: *Denny v. Barton* ⁽²⁾. On the other hand, though there be no express revocatory clause, the question is whether the intention of the testator, to be collected from the instrument, was that the dispositions of the earlier will should remain in whole or in part operative. Dr. Lushington, in giving the judgment of the Privy Council in *Henfrey v. Henfrey* ⁽³⁾, says, "the question is total revocation or partial revocation." And on this question Sir J. Nicoll says, in *Methuen v. Methuen* ⁽⁴⁾, "In the Court of Probate the whole question is one of intention; the *animus testandi* and the *animus revocandi* are completely open to investigation in this court." In the present case I am of opinion that the intention of the testatrix, to be collected from the dispositions of the two wills, is that the second should stand alone, and be in complete substitution for the first, and that it contains all the testamentary dispositions which she intended at that time to constitute her last will and testament, and consequently that it does by implication revoke the whole of the will of 1858.

I think that the whole scheme of the will of 1860 shows that it was intended to be a substitution for the will of 1858. I do not think it necessary to state in detail the several passages from which I draw this inference, because I adopt the view of Lord Penzance that the question is what dispositions did the testatrix intend, not which or what number of papers did she desire or *expect to be admitted to pro- [108
bate. It is sufficient to observe that it was not suggested, and it may be stated with confidence that it is impossible to show, that there is any provision of the will of 1858, unless it be the residuary clause in question, which is kept in operation by the will of 1860, otherwise than by its repetition in that instrument, and if this be the case, it strongly tends

⁽¹⁾ Law Rep., 3 P. & M., 153.

⁽²⁾ 2 Phillim., 575.

⁽³⁾ 4 Moo. P. C., 29.

⁽⁴⁾ 2 Phillim., 426.

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to show, though it falls short of absolute proof, that the non-repetition of the residuary clause in the will of 1860 indicates that the testatrix did not intend that it should continue in force. With regard to the disposition of the residuary personal estate contained in the will of 1858, it seems to me to be clear that the testatrix intended by the will of 1860 to make a totally different disposition of that property, which was included in the residuary clause of the first will. In the first place, she omits altogether the Roman Catholic Convent of the Sisters of Mercy at Bermondsey, while she seems to have desired to admit to a participation in her bounty another establishment connected in some way with Lady Georgiana Fullarton, as well as two charities for aged priests and poor Roman Catholic children. Secondly, those establishments which she still continues to wish to benefit (including the intervener's convent) are to receive only one fourth of one half of her stocks and shares after the death of her sisters, instead of one third of the whole, as under the will of 1858. The other half of her stocks and shares she gives, after the death of her sisters, to the children of her nephew. These stocks and shares constituted at the time she made the will of 1860, the whole or nearly the whole of the personal property which by the will of 1858 she had given to the three convents. The intention and effect of the will of 1860 was to deprive these three establishments to a large extent of the benefits she had previously conferred on them, and to give them what remained in a different manner, and in different proportions. This appears to me to amount to what is called in *Cutto v. Gilbert*⁽¹⁾ an essentially different disposition of the principal subject-matter of the residuary clause of the will of 1858, and therefore to be a revocation of that clause. It is true that by the sale of the Spanish certificates in 1862 the testatrix had removed them from the operation of her will of 1860, but when we are [109] *considering the question of the deceased's intention in 1860, the accidental change of her investments in 1862 can give little, if any assistance. It is in the highest degree improbable that the testatrix was aware that the sale of the certificates had any effect on her testamentary dispositions. It is incredible to me that she knew that by so doing she was depriving the children of her nephew of nearly £5,000, seeing that in a letter written in February, 1862, she writes, "My funds I have left to Sir William Lawson and his sons, who, after paying my annuities, will divide the remainder between

(1) 9 Moo. P. C., 131.

my sisters, and after their death will go (half) to charity, and half to my little great-nieces and nephews, just enough to keep them from starving."

It may be doubtful whether the testatrix intended at the time she made the will of 1860 to dispose only of her stocks and shares; it is possible that the absence of more comprehensive words was purely accidental, but I have no doubt that if the testatrix had such intention, it was because she considered that the shares and stocks constituted the whole of her personal property not previously disposed of, and therefore that any general residuary bequest was useless and unnecessary. The possibility of an undisposed of residue arising did not occur to her mind as a contingency to be provided for, and therefore she made no provision with regard to it. To put the matter in familiar language, I think that if the testatrix had been asked after the execution of the will of 1860, "Do you intend the contents to have any residue which there may be?" I think it may be fairly collected from that will that her answer would have been, "No; because I have otherwise provided for them, and others, by a disposition which I anticipate will leave no residue, and therefore I have not thought it necessary to make any general residuary bequest."

The result is that I am of opinion that the will of 1858 was entirely revoked by that of 1860, and I therefore reject the application to admit it to probate.

Solicitor for plaintiff: *T. Sismey.*

Solicitors for defendants: *Williamson, Hill & Co.*

[2 Probate Division, 110.]

/ Feb. 27, 1877.

*In the Goods of BROWN.

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Will—Executor according to the tenor.

The testatrix executed a will, which contained a clause to the effect, "I appoint my sister A. B. my executrix, only requesting that my nephews, C. D. and E. F., will kindly act for and with this dear sister":

Held, that C. D. and E. F. were executors according to the tenor of the will.

AMELIA SEAGOOD BROWN, of Sussex Villa, Ryde, Isle of Wight, spinster, died on the 9th of January, 1877, having executed a will bearing date the 29th of April, 1871. In this will was a clause to the following effect: "I appoint my said sister Susannah Brown my executrix, only requesting

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that my nephews, Frederick Poynder and John Arthur Beddome, will kindly act for or with this dear sister." Miss Susannah Brown and John Arthur Beddome died in the lifetime of the deceased. All the next of kin of the deceased were willing that probate of the will should be granted to the Reverend Frederick Poynder.

Searle moved that probate be granted to him as executor, according to the tenor of the will: If the sister had been alive, Mr. Poynder would have been entitled to take probate with her. The words "for her" must mean that if for any reason the sister could not take the grant, then that Mr. Poynder shall take it in her place or stead. If it were the intention of the testatrix that Mr. Poynder should act as her executor, it is not material that the word "executor" is not used. He referred to *Grant v. Leslie*⁽¹⁾; *In the Goods of Wilmot*⁽²⁾.

SIR J. HANNEN (President): I felt at first considerable doubt about this case. On further consideration, I think I am justified in holding that the two nephews of the testatrix are constituted executors according to the tenor of the will. I have already said that I was much struck with the peculiarity of the expression used by the testatrix; for whilst as regards her sister she appoints her executrix, she only requests her nephews to act for or with her. Her request, however, may be a courteous mode of expressing her desire [11] that the nephews should act, and *undoubted if she had used the word "appoint" instead of "request" I should have held it to be sufficient. Passing over that point, I have to consider the meaning of the passage in which she expresses her desire that her nephews will kindly act for or with her sister. I do not see how I can give effect to these words without holding that they confer on the nephews the powers of executors. In the case I referred to, *In the Goods of Stevenson*⁽³⁾, there was simply a request to assist in the execution of the will. I agree with Sir J. Dodson, that such an expression could not mean more than it said, namely, to assist the testatrix in the performance of her duties. But in this case the testatrix wishes her nephews to do more; she asks them to act for or with her sister; but they can only act for or with her in the same character as was conferred on her, namely, as executors. I think, therefore, the case comes within the principle of the decisions referred to by counsel and those cited in Williams on Ex-

⁽¹⁾ 8 Phillim., 116.⁽²⁾ 2 Roberts. Eccl., 579.⁽³⁾ 16 Jur., 714.

ecutors, p. 243, from which it appears that where a testator has expressed a wish that a person named shall administer his estate, he will be held to be an executor. I grant the application.

Solicitors: *Pitman & Lane.*

See 11 Eng. Rep., 394 note.

[2 Probate Division, 111.]

Feb. 27, 1877.

In the Goods of INCE.

Will—Codicil—Erroneous Reference by Date.

The testatrix being desirous to revive a will and codicil which had been revoked by a will of later date, sent them to her solicitor, in order that he might prepare a new will for that purpose. To save time he directed his clerk simply to re-copy them, which the clerk did, including the reference by date of the codicil to the first will. In this state the will and codicil were executed on the same day :

Held, that as there was no distinct intention expressed in the codicil to revoke the last will, the probate should be granted of it, together with the codicil.

LOUISA INCE, of Great Cumberland Place, Hyde Park, spinster, died at Ramsgate on the 22d of January, 1877. On the 26th of January, 1876, she duly executed a will, and on the 21st of February, 1876, a codicil to such will; but these testamentary papers were revoked by a will executed by her at the end of that year. On the 17th of January, 1877, Mr. Dixon, the solicitor of *the deceased, who had [112 his office in London, received instructions from Miss Ince to send to her a fresh engrossment of the will executed by her on the 26th of January, 1876, and of the codicil dated the 21st of February, 1876; and as there was not time before the post closed to incorporate the will and codicil in one instrument, he gave directions to his clerk to make copies of the will and codicil, omitting the dates, but it did not occur to him at the time that the date of the will was mentioned in the codicil. When the copying was completed, Mr. Dixon himself examined the engrossment of the will, but left the examination of the codicil to another person, who did not observe that the date of the old and revoked will was inserted in such codicil, instead of the date being left, as was intended, in blank, to be filled up at the time of the execution of the papers. The will and codicil were executed on the 18th of January, 1877, in the state they were prepared by the clerk. The will of the 18th of January, 1877, contained a clause revoking all former wills.

Pritchard moved for probate of the will and codicil executed on the 18th of January, notwithstanding the erroneous

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reference in the codicil to the will of January, 1876. He referred to *Rogers and Andrews v. Goodenough and Rogers* ⁽¹⁾; *In the Goods of Steele* ⁽²⁾.

SIR J. HANNEN (President): The will executed in January, 1877, contains a clause revoking all former wills; it therefore revokes the will of January, 1876. On the same day that the testatrix executed her last will, she also executed a codicil which is described as a codicil to her last will. It is true it says *my last will dated 26th January, 1876*, but I am of opinion that the testatrix meant what was really and truly her last will, namely, the document she had executed on the morning of the same day. It was a mere mistake of the date. In the absence of any evidence of intention on the part of the deceased to revive the will of January, 1876, I must grant probate of the will and codicil dated the 18th of January, 1877.

Solicitor: *G. Dixon.*

⁽¹⁾ 2 Sw. & Tr., 342; 81 L. J. (P. M. & A.), 49. ⁽²⁾ Law Rep., 1 P. & M., 575.

[2 Probate Division, 118.]

March 27, 1877.

[IN THE COURT OF APPEAL.]

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*THE PARANA. (6664.)

Damage—Delay—Loss of Market.

Where, on account of defects in the ship, the voyage had been protracted, and in the meantime the market price of the goods shipped had fallen:

Held, reversing the judgment of the Admiralty Division, that the consignee could not recover damages for the loss of market.

APPEAL from a judgment of the Admiralty Division, allowing damages for the loss of profits on cargo through the default of the shipowner.

By a charterparty it was agreed that the steamship Parana should load at Manilla and Ilo-Ilo, and proceed to London. She accordingly took on board some hemp and sugar at Manilla and more sugar at Ilo-Ilo; and then called at Singapore to fill up. In consequence of the weakness and defective state of her engines she was 127 days on the voyage from Ilo-Ilo to London, sixty-five or seventy days being said to be a fair average time. The assignee of the bills of lading, who was stated to be a mortgagee, instituted a cause of damage for this delay, claiming for loss by leakage of the sugar, and for loss on account of a fall in the price of hemp between the time when the ship ought to have arrived and

the time when she did arrive. The plaintiff had kept the hemp for some time afterwards, and had then sold it at a considerable loss.

The registrar and merchants allowed the damages for leakage of the sugar, but disallowed the damages for loss by the fall of price in the hemp. The judge of the Admiralty Division, on appeal, allowed £289 5s. 9d. for loss of market by the fall of price in the hemp. The facts of the case are fully stated in the report of the case in the court below (*).

*The defendant appealed.

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March 9. *Watkin Williams*, Q.C., and *Cohen*, Q.C., for the defendant: This is the first time that damages have been allowed to a shipper for loss of market, and such damages ought not to be allowed. The difficulties in allowing them are insuperable. If sugar had gone up whilst hemp had gone down, it would be impossible to allow the shipper to recover for the hemp and not allow for the sugar, and yet what is to be done if they belong to different shippers? Is the shipowner to lose when prices fall and not to gain when they rise? The matter is very clearly put in *Smeed v. Ford* (*). The cases as to delay on land have no bearing on this case, for by land the arrival at a fixed time may reasonably be calculated on, but a sea voyage is always uncertain. Here the ship was to stop and fill up, and no one could say how long she would be. *Hadley v. Baxendale* (*) is decisive. In *Fletcher v. Tayleur* (*) the principle was not questioned. A man might as well be held liable for damages for not paying money on a given day: *Cory v. Thames Ironworks Co.* (*). *British Columbia Saw Mill Co. v. Nettleship* (*) shows the principle. In *Wilson v. Lancashire and Yorkshire Ry. Co.* (*) the purpose for which the goods were wanted was known to the carrier; and so in *Collard v. South Eastern Ry. Co.* (*). If the shipowner had been asked whether he agreed to be liable for delay, of course he would have refused. The consignee is not obliged to sell directly the goods arrive, and in fact he did not; but suppose that before he did sell the price had risen, could he still recover? Under the Code Napoléon such damages can be recovered only when there has been fraud: Code Civil, Art. 1150, 1153.

(*) 1 P. D., 452; 18 Eng. Rep., 465.

(*) Law Rep., 3 C. P., 499.

(*) 1 E. & E., 602; 28 L. J. (Q.B.), 178.

(*) 6 C. B. (N.S.), 632; 20 L. J. (C.P.),

(*) 9 Ex., 341; 23 L. J. (Ex.), 179.

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(*) 17 C. B., 21; 25 L. J. (C.P.), 65.

(*) 7 H. & N., 79; 30 L. J. (Ex.), 393.

(*) Law Rep., 3 Q. B., 181.

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E. C. Clarkson, and Davison, for the plaintiff: The shipper has a right to expect that the ship will carry the cargo in the usual time, and damages for loss of market under such circumstances have often been allowed: *Horne* [20] v. *Midland Ry. Co.* (¹); *O' Hanlan* *v. *Great Western Ry. Co.* (²); *Borries* v. *Hutchinson* (³). Is the shipper never to be entitled to damages whatever be the delay, and is he only to be allowed interest on his capital, however great his loss may have been? He has paid the high freight on a steamer in order to have a quick delivery, and he is entitled to damages for not getting it. There can be no difference in principle between a carrier by land and a carrier by sea.

Watkin Williams, Q.C., in reply.

Cur. adv. vult.

March 27. The judgment of the Court (James, L.J., Mellish, L.J., and Baggallay, J.A.) was delivered by

MELLISH, L.J.: (After stating the facts and proceedings in the case.) The question we have to decide is whether, if there is undue delay in the carriage of goods on a long voyage by sea, it follows as a matter of course that, if between the time when the goods ought to have arrived and the time when they did arrive, there has been a fall in the price of such goods, damages can be recovered by the consignee of the goods. Now there is really no difficulty as to the general principles upon which the courts assess the damages. They are accurately stated in the judgment of Sir Robert Phillimore (⁴): "The principle is now settled that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object." He also cites the judgment of the Lord Chief Baron in *Horne* v. *Midland Ry. Co.* (⁵), to the effect that "Damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been [21] in the *contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

(¹) Law Rep., 8 C. P., 131.

(²) 6 B. & S., 484; 24 L. J. (Q.B.), 154.

(³) 18 C. B. (N.S.), 445; 34 L. J. (C.P.), 169.

(⁴) 1 P. D. at p. 463, citing from the case of *Simpson* v. *London and North Western Ry. Co.*, 1 Q. B. D. at p. 277.

(⁵) Law Rep., 8 C. P., at p. 137.

The difficulty, of course, arises in the application of those principles. We took time to consider our judgment because many authorities were cited, both in the court below and before us, though it seems to us that there is no decision which can be said to be directly in point. There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long voyage by sea, where there has been what may be called a merely accidental fall in price between the time when the goods ought to have arrived and the time when they did arrive—no case that I can discover where such damages have been recovered; and the question is, whether we ought to hold that they ought to be recovered. If goods are sent by a carrier to be sold at a particular market; if, for instance, beasts are sent by railway to be sold at Smithfield, or fish is sent to be sold at Billingsgate, and, by reason of delay on the part of the carrier, they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. So, if goods are sent for the purpose of being sold in a particular season when they are sold at a higher price than they are at other times, and if, by reason of breach of contract, they do not arrive in time, damages for loss of market may be recovered. Or if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum. But there is in this case no evidence of anything of that kind. As far as I can discover, it is merely said that when the goods arrived in November they were likely to sell for less than if they had arrived in October, for the market was lower.

But besides the cases of consignments of goods to be sold at a particular market, cases were cited—and it was on them that the court below proceeded—of the carriage of goods by railway, where damages for loss on account of a fall in the market have been recovered. It was said that there can be no difference between the carriage of goods by railway and the carriage of goods by sea, but it appears to me there may be a very material difference *between the two cases. [122] When goods are conveyed by railway, if they are conveyed for the purpose of sale, it is usually for the purpose of immediate sale; and if the cases are examined, I think it will be found that the courts treated them as if the goods were consigned for the purpose of immediate sale. No doubt if goods are consigned to a railway company under such circumstances, the railway company may be reasonably sup-

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posed to know that they are consigned for the purpose of immediate sale, and if by breach of contract on the part of the company they do not arrive in time to be sold when the owner intends them to be sold, that may possibly be a ground for giving damages for what is called "loss of market." The strongest case in favor of the decision of the court below is that of *Collard v. South Eastern Ry. Co.* ⁽¹⁾, but there was a good deal of doubt about that case. The goods in that case were hops, and were consigned to a hop merchant, in fulfilment of an actual contract. The damages arising from the non-fulfilment of that particular contract could not be recovered, because, of course, the railway company would know nothing about it; but the court came to the conclusion that the case must be treated as if the goods were consigned for the purpose of immediate sale. There were apparently very violent fluctuations going on in the hop market at that time, and it might be taken that the owner had selected his own time for selling his hops, when he thought the price was at its best, and by reason of a breach of contract on the part of the railway company—which consisted, it is to be observed, not in delay in delivering the hops, but in actual damage to the hops (the hops were damaged and had to be dried)—it might be considered that there was a loss of market. Mr. Baron Martin there says ⁽²⁾: "It is said that the defendants had no notice of the purpose for which the hops were sent to London; but I think that they must have known that they were sent for one of two purposes—either for consumption by the person to whom they were sent, or, as was more likely to be the case, to be sold for profit. It seems to me that *Hadley v. Baxendale* ⁽³⁾ has no bearing on this case, and I think that *Smeed v. Ford* ⁽⁴⁾ was correctly decided. In my judgment the [123] plaintiff is entitled *to recover for this damage, because it is a direct and immediate loss consequent on the defendants' breach of duty." Then he says: "If this case should be taken to the Court of Error"—showing he had some doubt about the principle they were laying down—"I hope that court will be able to put the rule on an intelligible footing; but at present we must do the best we can with each particular case, and decide it upon principles of reason and good sense."

The other case on which Sir Robert Phillimore principally relied was an American case of *Ward v. New York Central*

⁽¹⁾ 7 H. & N., 79; 30 L. J. (Ex.), 393.

⁽²⁾ 7 H. & N., at p. 86.

⁽³⁾ 9 Ex., 341; 23 L. J. (Ex.), 179.

⁽⁴⁾ 1 E. & E., 602; 28 L. J. (Q.B.), 178.

Ry. Co. ('), in which some pigs had been sent, and there damages were allowed to be recovered. The precise circumstances it is not very easy to gather, but I should certainly conjecture that the pigs sent in that case were sent for the purpose of being sold at once.

The difference between cases of that kind and cases of the carriage of goods for a long distance by sea seems to me to be very obvious. In order that damages may be recovered, we must come to two conclusions—first, that it was reasonably certain that the goods would not be sold until they did arrive; and, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier at the time when the bills of lading were signed. It appears to me that nothing could be more uncertain than either of those two assumptions in this case. Goods imported by sea may be, and are every day, sold whilst they are at sea. If the man who is importing the goods finds the market high, and is afraid that the price may fall, he is not usually prevented from selling his goods because they are at sea. The sale of goods to arrive, the sale of goods on transfer of bill of lading, with cost bills and insurances, is a common mercantile contract made every day. It may be that from not having samples of the goods, or from not knowing what is the particular quality of his goods, the consignee may have a difficulty in selling them until they arrive, but that would not affect the question. Nor would it signify that the goods no longer belonged to the original consignee, but to a man who had acquired them by the assignment of the bill of lading whilst the goods *were at sea. We were told that in this case the [124 plaintiff was a person who had advanced money on the security of the bills of lading. That possibly may be the case; but whether he has done that, or is the purchaser, would make no difference. It was said that the goods were sold, and that if the person who sells them does not suffer the damage, then the purchaser would suffer the damage. But that is pure speculation. If a man purchases goods while they are at sea, no person can say for what purpose he purchases them. He may purchase them because he thinks that if he keeps them for six months they will sell for a better sum, or he may want to use them in his trade. It is pure speculation to enter into the question for what purpose he purchases them. In this particular case the plaintiff did not sell the goods when they arrived, for he sold them some months afterwards, when a further fall had

(') 47 N. Y., 29.

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taken place in the market. Of course, he does seek to recover from the defendant that additional loss, but this serves to illustrate how uncertain it is whether he would have sold them. If he did not sell them when they did arrive, but kept them because he thought the market would rise, how can we tell that he would not have done exactly the same thing if the goods had arrived in time? Therefore, it seems to me, that to give these damages would be to give speculative damages—to give damages when we cannot be certain that the plaintiff would not have suffered just as much if the goods had arrived in time. According to the principles on which the courts have acted in all such speculative and uncertain cases damages ought not to be recovered.

Therefore, upon the whole, we have come to the conclusion that the report of the registrar and merchants is right. They said that it had never been the practice in the Court of Admiralty to give such damages, and though it constantly happened that by accidents such as collisions goods were delayed in their arrival, it never had been the custom to include in the damages the loss of market; and we are of opinion that the conclusion which the registrar and merchants came to was right. The consequence, therefore, is, that the judgment of the court below must be reversed.

As to the costs, the registrar and merchants reported that [25] each *party ought to pay his own costs of the inquiry before them, and we think that ought to be retained, and that the appellant should have his costs of the argument in the court below.

Judgment reversed.

Solicitors for plaintiff: *Stibbard & Cronshay.*

Solicitors for defendant: *Parker & Clarke.*

C A S E S
DETERMINED BY THE
CHANCERY DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
CHIEF JUDGE IN BANKRUPTCY,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE
AND IN
L U N A C Y.

[4 Chancery Division, 389.]

M.R., Nov. 20, 1876.

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[1872 H. 30.]

*Administration Suit—Executors—Partial Distribution before Suit—Mistake—Incorrect
Accounts—Liability of Executors—Costs.*

Where executors have made a proper distribution *pro tanto* of their testator's estate, and have been ready to produce proper accounts to the unpaid residuary legatees, and an administration action is then instituted by the unpaid residuary legatees, and it turns out that the accounts are substantially correct, the costs of the action must be borne by the residuary legatees who take the benefit of it.

But where, after executors had made a partial distribution of the residue, an administration action was instituted by the residuary legatees who had not received their shares, and it then turned out that the executors had made two mistakes, first, in making their distribution upon an erroneous assumption that the residue was divisible among five persons instead of six; and, secondly, in expending part of the general personal estate in repairs of property specifically devised:

Held, that the overpaid residuary legatees could not be made to refund, that the executors must stand in the same position as if no distribution had taken place, and

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that the costs of the action should be paid as out of the entire residuary estate, so as to charge the executors with the share of costs attributable to each of the distributed shares; and then that the executors should pay the balance necessary to make up to the unpaid legatees one-sixth of the residue each.

Form of Order.

FURTHER CONSIDERATION. Thomas Brewitt, by his will, dated the 11th of December, 1855, after making various specific devises and bequests, gave his residuary real and personal estate to his executors upon trust for his grandchildren in equal shares as tenants in common when and as they should respectively attain the age of twenty-one years. At the date of his death, which happened on the 22d of June, 1857, the testator had five grandchildren, one, Clement Hilliard, being an infant. A sixth grandchild, Harold Hilliard, was born after the death. The executors, supposing that according to the true construction of the will the five grandchildren who were living at the testator's death were alone entitled under the residuary gift, divided the residuary [390] estate, which they represented as amounting *to £3,750, into five equal shares, and paid four of such shares, consisting of £750 each, to the four adult grandchildren (who thereupon executed releases of their shares), and retained the remaining share for the benefit of the fifth grandchild, Clement. Shortly afterwards applications were made by the guardian of the two infant grandchildren, Clement and Harold, to the executors for accounts, which, however, they refused to render, whereupon the bill in this suit was filed by the infants, by their next friend, for the administration of the testator's residuary estate, and for the usual accounts, and praying costs against the defendants, the executors. Harold Hilliard was afterwards made a defendant by amendment.

The suit came on for hearing on the 5th of July, 1873, before Lord Selborne, sitting for the Master of the Rolls, when an administration decree was made declaring that all the six grandchildren of the testator were entitled to share equally in his residuary estate, but no order was made as to costs.

On taking the accounts directed by the decree, the executors were charged with a sum of £1,095 which had by mistake been expended by them out of the general personal estate in the repairs of certain houses forming part of the real estate specifically devised.

The £750 constituting the share of the infant Clement Hilliard retained by the executors, had been paid into court and invested in consols.

The cause now came on for hearing on further consideration, the question being how the costs were to be borne.

Chitty, Q.C., and *Nalder*, for the plaintiff: This suit was occasioned by the refusal of the executors to render proper accounts; and it now turns out that they made mistakes both in distribution and account. Under these circumstances, though it may be admitted not to be a case in which the executors should be ordered to pay the whole costs of the suit, still they ought not to be entirely relieved from the consequences of their mistakes. The case should, we submit, be treated as if no distribution had taken place, the distributed shares being brought into account, so that the shares of the plaintiff and infant *defendant will [39] each be chargeable with one-sixth only of the costs. In *Mackenzie v. Taylor* ⁽¹⁾ and *Thompson v. Clive* ⁽²⁾, where there had been partial distribution, and the plaintiffs, who were entitled to the shares remaining undistributed, filed bills against the executors for administration, Lord Langdale ordered the costs to be paid out of the plaintiffs' shares alone, but that was because the executors' accounts turned out to be substantially correct, which is not the case here. But even where the accounts were substantially correct it was held by Lord Romilly, in *Gravatt v. Tann* ⁽³⁾, that the executors, who were also residuary legatees and had retained their shares, must bring in and account for the shares they had retained before they could receive their costs.

Waller, Q.C., and *Dauney*, for the defendants, the executors: As regards the plaintiff, his £750 is secured, and the share he will ultimately receive after payment of the costs chargeable thereon cannot exceed that sum. This is, therefore, useless litigation as far as he is concerned. As to the infant defendant, we ought to have our costs up to the hearing paid out of his estate, for he had the benefit of the decision of the court upon the construction of the will. If the plaintiff's view is acceded to we shall virtually be called upon to pay out of our own pocket for having the will construed. At all events, we submit that, under the circumstances, we are entitled to deduct our costs, charges, and expenses from the balance which has been found due from us: *Ottley v. Gilby* ⁽⁴⁾.

Street, for the infant defendant.

JESSEL, M.R.: The case is one of some novelty, and though I think it must have occurred before, I am not aware of it. The question is, what is the proper rule as to the

⁽¹⁾ 7 Beav., 467.

⁽²⁾ 11 Beav., 475.

⁽³⁾ Law Rep., 7 Eq., 436.

⁽⁴⁾ 8 Beav., 602.

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incidence of costs where executors have, as in this case, *bona fide* divided the residuary personal estate only partially—partially only in this sense, that some of the legatees having attained their ages, were entitled to call for their 392] *shares, and the executors, upon being asked for them, made up their accounts and paid them before suit?

Now the facts, so far as it is necessary to state them, are very few and simple. There were six residuary legatees. The executors made a mistake as to the construction of the will and thought five only were entitled to participate, and they made up their accounts upon that footing. When four of them attained the age of twenty-one—one being an infant—they divided the estate, and paid over what they considered to be four-fifths of the residue, and retained the infant's share. Afterwards the infant—being still an infant—filed a bill to have the accounts taken, and made this other child, who was supposed not to be entitled to a share, a co-plaintiff, though he was ultimately made a defendant. The cause came to a hearing before Lord Selborne, sitting for the Master of the Rolls, and he decided that the executors were wrong in their construction of the will, and that all the six grandchildren were entitled to participate. They certainly divided the estate upon a wrong footing. No order was made as to costs. The accounts were taken in Chambers, and it was found that the executors were wrong also in their discharge. They had claimed a sum of £1,095 in their discharge for money which it turned out had really been laid out by them, but through some mistake it had been laid out in repairing houses forming real estate which belonged, not to the residuary legatees, but to the specific devisees. Consequently, when they got into Chambers, the mistake was set right, and they were charged with the sum of £1,095; so that, on taking the account, the result was that their accounts were substantially wrong, but there was no imputation of dishonesty or intentional impropriety of conduct upon the part of the executors.

The suit now comes on for hearing on further consideration; and it seems that, after paying all the costs of the suit, the result will be that the executors will have paid probably more than their shares to the adult residuary legatees; that is, if the estate were now to be distributed, they would not get as much as £750 each. The question is, who is to make good the difference? That is really what it comes to. It appears to me, under such circumstances, the right rule is, that the executors who made the mistake in the distribution of the fund cannot be allowed to say that

the *accounts are substantially correct, and that they [393 have made a fair distribution, and that the plaintiff should pay the costs of the suit. It is clearly a case in which the suit has been properly instituted. I quite agree, where executors have made up their accounts carefully and in a proper manner, and have kept vouchers so as to have them always ready to be seen, and have divided the residue partially—that is, given the shares to those who are adult—without suit, it would be unreasonable to make them pay a proportion of the costs of a suit subsequently instituted by some of the other residuary legatees; for the result would be that no executors would ever divide an estate without instituting a suit. Supposing there are ten residuary legatees, nine of whom are of age and one is an infant (and possibly one may be a married woman with a settlement, or something of the kind), and the executor distributes the shares of the adult legatees, and supposing that at some subsequent period somebody institutes a suit and asks that all the costs may be thrown upon the estate in the same manner as if no distribution had taken place, the executor might say, “If the plaintiff’s view is right I shall have to make good out of my own pocket the share of costs attributable to each residuary legatee.” It is obvious that such a rule would be in the highest degree inconvenient. To use a common phrase, it would throw every estate in the kingdom into Chancery, which no one would desire, least of all the judges of the Chancery Division.

Now that being so, I think the rule must be that where the executors have properly distributed the estate and are ready to show the accounts, and also proper vouchers, to the residuary legatees, or to the guardian of an infant—if there are infants—and an administration suit is then instituted, and it turns out that the accounts are substantially correct, the costs of that suit ought to be borne by the shares of the parties who institute and take the benefit of the litigation—that is, the remaining shares. As I read the authorities, namely, the cases of *Mackenzie v. Taylor* ⁽¹⁾ and *Thompson v. Clive* ⁽²⁾, both of which were before Lord Langdale, that was the view he took of the law, although it is not so clearly stated as would be desirable in order to show what the rule was. But where, as in this case, the accounts are substantially *incorrect, and where the [394 executors have made two most serious mistakes, one in choosing to take upon themselves the office of the court in

⁽¹⁾ 7 Beav., 467.

⁽²⁾ 11 Beav., 475.

construing an obscure will, and construing it wrongly, and secondly, making so serious an error as laying out as much as £1,095 in repairing a freehold which did not belong to their *cestuis que trust*, I think the executors cannot be allowed to say that the distribution is a proper distribution, and that it ought to avail them when the accounts come to be subsequently taken. I think they must stand in the same position as if there had been no distribution at all. Therefore I think the right order is that the whole costs of the administration suit should be taken out of the estate as if they had never divided it, so that the plaintiff and the infant defendant will be entitled to exactly the same shares out of the residuary estate as if no distribution had taken place and the other residuary legatees had been made defendants. Of course you cannot make those other residuary legatees pay back anything. There is no pretence for saying that they can be compelled to come in and contribute. Therefore the difference, which I think cannot be very large, will in substance have to be made good by the executors who wrongly distributed the estate: they who have made the error will have to pay for it. Upon these grounds I think justice will be done. The simplest plan will be to order the defendants, the executors, to pay the costs of the plaintiff and the infant defendant, and to make good the necessary amount after allowing their own costs, charges, and expenses, to be taxed in the usual way. The net residue will then be ascertained, and the executors will make good the amount of the two-sixths by payment into court of the balance found due. When that is ascertained, it can be inserted in the order without going to Chambers, and the interest will be at the rate of £4 per cent. from the time of distribution, credit being given for any interest the executors have paid.

The minutes of the order were to the following effect:—

Tax the costs of all parties as between solicitor and client, including in the costs of the executors their charges and expenses properly incurred. Distinguish the party and party costs of the plaintiff and infant defendant. Order the executors to 395] pay the costs of the plaintiff and infant defendant as between *party and party out of the balance found due from them within fourteen days after the Taxing Master's certificate. Treat the costs which the executors are to pay as above, and their own costs, charges, and expenses as payable out of the testator's entire residuary estate (consisting of the £3,750, the consols in court, and the balance found due from the executors with any return for overpaid probate or legacy duty), and let the executors pay into court the balance which, with the consols in court, will make up to the plaintiff and infant defendant the full amount of a sixth share of residue each. The executors to be charged with interest at £4 per cent. on the infant's shares from the date of the release, and to have credit for any sums properly paid

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for maintenance or education of the plaintiff and infant defendant. The extra costs of the plaintiff and infant defendant to be paid out of their shares, and the ultimate balances to be carried to their respective separate accounts.

Solicitor for plaintiff and infant defendant: *E. Woodard*.

Solicitors for defendants, the executors: *Austen, De Gex & Harding*.

[4 Chancery Division, 413.]

M.R., Dec. 4, 1876.

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[1876 C. 206.]

Administration Action by possible designated Next of Kin—Unascertained Class—Contingent Interest—Right of Action—Adding Parties—Rules of Court, 1875, Order XVI, r. 2.

Bequest on the death of testator's daughters without issue to the persons who would be entitled under the statute if testator had then died intestate. Administration action brought in the lifetime of the daughters, and before they had had any issue, by persons who would then be next of kin if the daughters were dead without issue:

Held, on demurrer, that the plaintiffs had only an expectation and not an interest, and were not entitled to maintain the action.

Roberts v. Roberts ⁽¹⁾ considered.

A plaintiff can only be added under Rules of Court, 1875, Order XVI, rule 2, where there has been a *bona fide* mistake.

CHARLES CLOWES, by his will, dated the 16th of November, 1857, bequeathed his residuary personal estate to trustees upon trust to pay the income of £4,000, part thereof, to his daughter Frances during her life, and directed that upon her death the said sum should fall into the residue. And subject thereto, the testator declared that his residuary personal estate should be held upon the trusts therein mentioned for the benefit of his daughters Isabella, Helen, and Emily, and their respective issue, in equal shares, with cross remainders between them, the issue to take vested interests at twenty-one or marriage. And the testator *de- [414] clared that "if all my said daughters Isabella, Helen, and Emily shall die without having any child, children, or issue who under the trusts aforesaid shall acquire a vested interest in the premises; then I direct that my trustees shall stand possessed of the residue of my said personal estate, and the stocks, funds, and securities on which the same shall be from time to time invested, in trust for such person or persons as would have been entitled to the residue of my trust estate under and according to the Statutes of Distribution in case I had then died intestate."

⁽¹⁾ 2 Ph., 534.

The testator died on the 4th of June, 1869, leaving his four daughters surviving him.

This was an action for the administration of the testator's personal estate, the plaintiffs being two of the nephews and a niece of the testator, who would, as some of his next of kin, be entitled to part of his residuary personal estate if his four daughters, who were all living and unmarried, were now dead without issue.

None of the daughters were parties to the action, and it appeared to have been instituted against their wishes.

The testator's daughter Frances was a person of unsound mind. One of the other daughters was, it was said, about to be married.

The defendant, the surviving trustee and executor of the will, demurred to the plaintiffs' statement of claim on the ground that they had no such interest as entitled them to institute the action.

Ince, Q.C., and *E. Ward*, for the demurrer: The plaintiffs claim as members of a class which cannot at present be ascertained, being ascertainable only on the happening of a future contingent event. They have, therefore, no present interest, but merely the expectation of a future interest, which is not sufficient to entitle them to maintain an action.

[They were stopped by the court.]

Chitty, Q.C., and *T. L. Wilkinson*, for the plaintiffs: We have a present interest, contingent on the daughters dying without issue, and though it may not be a valuable interest, still it is one which the law recognizes: *Roberts v. 415* *Roberts* ⁽¹⁾. In **Davis v. Angel* ⁽²⁾, Lord Westbury says ⁽³⁾: "An existing interest, whether it be vested or contingent, however future or remote, may, if it be a present interest, form the foundation of a right in the party representing it to come here with a bill to have the share secured." We submit, therefore, that our interest is such as to enable us to maintain this action. If, however, your Lordship should be of a contrary opinion, then we ask, under Rules of Court, 1875, Order XVI, rule 2, for an order adding the testator's daughter Frances as plaintiff.

[JESSEL, M.R.: That rule only applies where the action has been "commenced through a *bona fide* mistake." It does not apply to such a case as this.]

JESSEL, M.R.: I am of opinion that the plaintiffs are not entitled to maintain this suit.

The question I have to decide is whether members of an

⁽¹⁾ 2 Ph., 534.

⁽²⁾ 4 D. F. & J., 524.

⁽³⁾ 4 D. F. & J., 529.

unascertained future contingent class are proper parties to institute an action.

I should have thought the question had been the subject of decision over and over again; but, however, I cannot find that the exact point has been decided in any reported case. The time has passed in which every person interested in the subject-matter of a suit had to be made a party to it, for no rule is better established than that a contingent class need not be represented in a suit. The question is whether they may or may not be plaintiffs. Now, we are familiar with the doctrine that a person having an existing interest, however future or remote, may, so long as it is a present interest, institute a suit; but can a person having the mere expectation of a future interest institute a suit? In the analogous case of a vested remainder in tail in real estate, it was always the rule that the person entitled in remainder after the estate tail could not institute a suit. Now in this case the gift is to those persons who may answer the description of the testator's next of kin at the period when all his four daughters shall have died, and, as to three of them, without issue who shall have acquired vested *interests. That is, it is [416 a gift to a future contingent class of persons. It is as if the testator had said, "I give to those persons who, if I continue to live up to a certain period, would at that period be my next of kin." Therefore these plaintiffs, who claim to be some of the testator's possible next of kin, are in the same position as persons claiming to be next of kin of a living person. *Ex hypothesi* the testator is to live on. Whether, therefore, you attempt to ascertain the next of kin of a living person or of a person dying at a future period, it is the same thing; there is no difference. You cannot predicate of any one that he will be a member of the class. It is, therefore, an unascertainable future contingent class, a class to be ascertained on a future event; *ergo*, it cannot be ascertained now. If the testator's next of kin are to be ascertained now, then the daughters are sole next of kin and the only persons entitled to sue as such. Who are the persons instituting this action? They are collateral relations—nephews and a niece of the testator, and persons who would now be some of his next of kin only if the daughters and their issue were out of the way. One of the daughters is about to be married, and probably she may have children. How can the plaintiffs affirm that, on the failure of the daughters and their issue, if the event ever happens, they or any of them will be then alive? They may all then be dead. They have, in fact, neither a present interest nor anything

beyond the expectation of a future interest. They have no interest at all, either vested or contingent; and it is a rule of this court that to enable them to sue they must have either the one or the other. Two cases have been referred to, one of which, *Roberts v. Roberts* ⁽¹⁾, was a case of great singularity. Now, speaking with all deference to Lord Cottenham, who decided that case, there are portions of his judgment I am unable to follow. The testator gave his residuary personal estate to his three daughters, who were his only children, with an ultimate trust, "in the event of their all dying under twenty-one, and without having been married, for those who would then be entitled under the Statutes of Distribution." The testator's widow was joined as co-plaintiff in a suit for the administration of the estate, and a general demurrer was put in on the ground of misjoinder, 417] it being *contended that the widow had not such an interest as entitled her to be a party. It was held that she was a proper party, but for a reason I cannot understand. If it had been said that she was at present actually entitled to a portion of the residuary personal estate, I could have understood the decision. She had no doubt an interest as well as the next of kin at the testator's death, but subject to its being defeated. But that was not the ground of the decision. The ground upon which I feel a difficulty is this, that Lord Cottenham makes a distinction between the widow and the next of kin. He says ⁽²⁾: "There is a great difference between the widow and the next of kin. The next of kin are unascertained. The widow is no part of a class, but entitled in her own individual right; if she dies she loses her right." Now the gift was to a class to be ascertained at a future time, and the widow was not at present a member of that class; she might have been if she had lived so long; so might the testator's present next of kin if they had lived so long. It seems to me, therefore, that the distinction which Lord Cottenham made was not a sufficient answer to the question. He says in his judgment ⁽³⁾: "Now, even assuming the appellant's construction of the will to be correct, the widow is already contingently entitled to a share of the testator's estate in the event of her surviving her children, and their all dying under twenty-one and unmarried. Nothing can prevent her taking a share, but her dying before the period arrives at which the interest of the daughters ceases. She is no part of a class, but has a separate and individual right to a portion of her husband's property not disposed of." Now, if Lord Cottenham means that as the

⁽¹⁾ 2 Ph., 534.⁽²⁾ 2 Ph., 535.⁽³⁾ 2 Ph., 536.

widow takes a share now, and therefore will be entitled even if the contingent class fails, I can understand his decision. It is clear that he makes a distinction between the members of the class and the widow, but, with great deference, I see no such distinction. The gift is to a class of persons of whom the widow may or may not be one. How can that be such an interest as to enable her to maintain a suit? So far as the decision goes, it is not favorable to the plaintiffs, for Lord Cottenham seems to have considered that the testator's sister, who was one of his possible *future next of [418 kin, had not such an interest as to enable her to be a plaintiff, although the widow had.

In the other case which was referred to, *Davis v. Angel*⁽¹⁾, before Lord Westbury, the gift in effect was this: It was a gift to the testator's nephew for life, with remainder to his eldest or only child, subject to a condition precedent that the nephew should marry a specified niece of the testator. The nephew, in the testator's lifetime, married some one else, and he, his wife, and a son were living at the testator's death. It was held that the possibility of the nephew's wife predeceasing him and his marrying the niece did not confer upon the nephew's son an interest sufficient to enable him to maintain a bill. Lord Westbury says⁽²⁾: "He has no interest whatever at present. He has, as I have already said, an expectation of the possibility of a future event, which, if it occurs, may give birth to an interest." The decision is clear that nothing less than an interest will allow a man to maintain a suit. Therefore, looking at it as an authority binding on me, it is a decision in favor of the demurring party and against the plaintiffs. Proceeding, then, upon the sound principle that a person who may not be a member of a class which is to be ascertained, and which is to take upon the happening of a future contingent event, is not a person who can maintain an action, I am of opinion that the plaintiffs had no right to institute this action, and the demurrer must therefore be allowed.

Solicitors for plaintiffs: *Allin & Greenop*.

Solicitors for defendant: *Talbot & Tasker*.

⁽¹⁾ 4 D. F. & J., 524.

⁽²⁾ 4 D. F. & J., 531.

[4 Chancery Division, 419.]

M.R., Dec. 5, 1876.

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*LEYLAND V. STEWART.

[1876 L. 36.]

Copyright—Parol Assignment—Assignment in Writing—5 & 6 Vict. c. 45.

An assignment of a copyright under 5 & 6 Vict. c. 45, must be in writing.

Accordingly, where the author of a song agreed verbally with S. to part with his copyright, and subsequently by instrument in writing assigned it to L., who entered the song at Stationers' Hall:

Held, that the title of L. must prevail, and that he could sustain an action to restrain S. from infringing his copyright.

THIS was an action by the plaintiff, a music publisher, to restrain an alleged infringement by the defendant, also a music publisher, of the plaintiff's copyright in the words and music of a song called Mignonette.

The song was, in the year 1868, published by the defendant under a verbal agreement with the author, Suchet Champion, but no instrument of assignment of the copyright was executed by him to the defendant.

By an instrument in writing dated the 25th of March, 1874, Champion assigned to the plaintiff the entire copyright of the words and music of the said song, in consideration of a royalty on each of the copies sold.

On the 2d of July, 1874, the plaintiff, as proprietor of the copyright of the song, made entry in the registry book of the Stationers' Company of the title of the song, and of the several other particulars required by the act 5 & 6 Vict. c. 45, and notice of the assignment was given to the defendant.

The defendant, after the said dates of assignment and registration, continued to publish and sell many copies of the said song, and the plaintiff now claimed damages for the infringement of his alleged copyright, an account of profits made by the defendant, and an injunction to restrain the publication and sale of the said song.

Ince, Q.C., and *Byrne*, for the plaintiff.

420] **Chitty*, Q.C. (*Kekewich* with him), for the defendant: The defendant had a prior title to the copyright under the verbal assignment in 1868, for an assignment is not required to be in writing under 5 & 6 Vict. c. 45. In *Wood v. Boosey* (¹) Cockburn, C.J., observed: "The moment the copyright is established in the original proprietor, there is nothing to prevent him from assigning by any mode by which property of that description can be assigned in law."

(¹) Law Rep., 2 Q. B., 340, 351.

JESSEL, M.R.: I am of opinion that the plaintiff is right in law. The case is a simple one, and appears to me to be concluded by authority, for though no judicial interpretation appears to have been put on the 13th section of the act 5 & 6 Vict. c. 45, yet all the decisions as to assignments of copyright being in writing under the act of 8 Anne, c. 19, apply to the later statute.

Under the old act it was established by a series of decisions that, as the consent in writing of the proprietor was required to the printing of any book by any person, the assignment, which was a greater thing, must be in writing also: *Power v. Walker* ('). The provisions of the old act as to "consent in writing" are re-enacted by sect. 15 of 5 & 6 Vict. c. 45. So, upon the principle of those decisions, an assignment of a copyright now, unless made by entry in the registry at Stationers' Hall, must be in writing, and an assignment not in writing is not sufficient. Therefore in this case, the defendant, claiming as he does under a parol assignment, cannot prevail against the plaintiff's title.

Solicitor for plaintiff: *R. G. Marsden*.

Solicitor for defendant: *James Mason*.

(') 3 M. & S., 7.

[4 Chancery Division, 421.]

M.R., Dec. 9, 1876.

***CROSSLEY V. CITY OF GLASGOW LIFE ASSURANCE [421
COMPANY.**

[1876 C. 144.]

Life Policy—Deposit to secure Debt—Equitable Assignment—Death of Assured—Notice to Office of Creditor's Claim—Absence of Legal Personal Representative of Assured—Payment to Creditor—Interest—Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144)—Chancery Amendment Act, 1852 (15 & 16 Vict. c. 86), s. 44.

S. having effected two policies on his life for the purpose, as he expressly informed the assurance company, of enabling him to give C. a security for a debt which exceeded the amount of the policies, deposited them with C., at the same time asking him by letter to instruct his, C.'s, solicitor "to prepare the necessary assignment." C., however, never took any assignment. S. died insolvent, having made a will appointing executors, but no representation was taken out to his estate. C. then gave the company notice in writing of the death, and that he held the policies as security for his debt, and the company acknowledged the receipt of the notice in the terms of the Policies of Assurance Act, 1867, s. 6. Proper evidence of S.'s death having been subsequently produced to the company, they wrote to C. that the claim under the policies would be paid at the expiration of three months, but that the assent of S.'s legal personal representative would be required before settlement.

After the expiration of the three months C., being unable to obtain payment of the policy moneys (although his debt was admitted by S.'s executors, and he offered the company an indemnity), brought an action for that purpose against the company,

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insisting that S.'s deposit and letter constituted an equitable assignment of the policies within the Policies of Assurance Act, 1867, and therefore enabled him to give a valid discharge for the moneys:

Held, that there had been no equitable assignment of the policies within the act, and that the company were justified in refusing to pay him in the absence of S.'s legal personal representative:

Ordered, payment of the policy moneys to the plaintiff after deducting the company's costs, the legal personal representative being dispensed with under the power given to the court by sect. 44 of the Chancery Amendment Act, 1852 (15 & 16 Vict. c. 86): also payment by the company of interest at 4 per cent. from the day which had been fixed by them for the payment of the principal.

Wolfe v. Findlay ⁽¹⁾ disapproved of.

IN the year 1867, the plaintiff, John Crossley, Esq., M.P., lent Julius Sichel and his brother, Emil Sichel, who were 422] partners in *trade, the sum of £5,000 without security. In the year 1870, the plaintiff pressed Julius Sichel for a security, and it was ultimately arranged that Julius Sichel should insure his life and assign or deposit the policies to or with the plaintiff. Accordingly, on the 10th of October, 1870, Julius Sichel effected two policies on his life in the defendants' office for £1,500 and £1,000 respectively, the moneys being made payable on the death of the assured to his "heirs, executors, administrators, or assigns" in the usual form. On the 12th of October, 1870, Julius Sichel informed the defendants by letter that the policies had been taken out as a security for the plaintiff's benefit.

On the 21st of October, 1870, Julius Sichel forwarded the policies to the plaintiff, accompanied by the following letter:—

"My dear Sir,—By this post, registered, I send you as promised two policies on my life. My brother Emil intends paying the half-yearly premiums on the one for £1,500, and I will (D.V.) pay the quarterly premiums on the smaller one of £1,000. Kindly instruct your solicitor to prepare the necessary assignment to your good self.

"Most faithfully yours,
"Julius Sichel."

Through some oversight, however, on the part of the plaintiff, no further or other security was ever prepared or executed, but he retained the policies in his possession, the premiums being paid as proposed in the above letter.

On the 15th of October, 1874, Julius Sichel died, having made a will appointing executors, but as he died insolvent the will was never proved, and in fact no one had taken out administration to his estate.

On the 14th of September, 1875, the plaintiff's solicitor

(¹) 6 Hare, 66.

wrote the defendants a letter giving them notice of the death of Julius Sichel, and also that his client "held the two policies as security for certain advances made by him to the deceased largely exceeding the amount of the policies."

This notice was acknowledged by the defendants by a receipt in the terms of sect. 6 of the Policies of Assurance Act, 1867, and signed by their secretary, for which the plaintiff paid the statutory fee of 5s.

*The plaintiff subsequently forwarded to the de- [423
fendants a certificate of J. Sichel's death, and on the following day, the 7th of October, 1875, their secretary wrote to the plaintiff informing him that the claim under the policies would be paid on the expiration of three months from that date, but that probate of the will or letters of administration would be required before settlement.

At the expiration of the three months the plaintiff applied to the defendants for payment, informing them that Sichel's executors admitted his debt, but they still insisted that in the absence of any deed of assignment of the policies, probate or letters of administration must first be produced, and the assent of Sichel's properly constituted legal personal representative obtained. Some correspondence then passed between the plaintiff's solicitor and the defendants' manager, in the course of which the former admitted that "the difficulty was that there never had been any assignment of the policies" to the plaintiff, and offered the defendants an indemnity and an undertaking to produce probate or letters of administration whenever obtained, but the offer was refused.

On the 5th of April, 1876, the plaintiff's solicitor made a formal written application to the defendants for immediate payment of the amounts due on the policies, at the same time inclosing copies of Sichel's letter of the 21st of October, 1870, and of certain letters written by his executors, in which they admitted the plaintiff's debt and offered to render him every assistance in their power to enable him to recover the moneys, short of proving the will, which, having regard to the state of their testator's affairs, they declined to do.

The defendants nevertheless still refused to pay the plaintiff, and accordingly, on the 22d of April, 1876, he brought this action against the defendants, claiming a declaration that the policies had been assigned to him for valuable consideration, and that he was beneficially entitled thereto, and to the moneys payable thereunder, and an order for payment accordingly, together with interest from the 7th of January, 1876, the date fixed for payment of the moneys

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by the defendants' letter of the 7th of October, 1875: there was no claim for costs.

The plaintiff's evidence in support of his claim consisted of the whole of the correspondence.

424] *The defendants, in their statement of defence, submitted that the plaintiff was unable to give them a valid discharge or receipt for the policy moneys, and declined to admit the plaintiff's statement of the dealings between himself and Sichel, as they knew nothing of the state of accounts between them. They further submitted that there had been no legal or absolute assignment of the policies to the plaintiff within the Policies of Assurance Act, 1867, or otherwise, which could enable him to sue them in his own name, and that Sichel's legal personal representative was a necessary party to the action. They also expressed their willingness to act under the direction of the court as to the payment of the moneys.

The action now came on for hearing.

Chitty, Q.C., and *W. W. Cooper*, for the plaintiff: We submit that the letter of the 21st of October, 1870, coupled with the deposit of the policies with the plaintiff, operated as an equitable assignment within the Policies of Assurance Act, 1867, and enabled him to give a valid discharge for the moneys. In fact, the defendants, in acknowledging the notice of the 14th of September, 1875, as required by the act of 1867, accepted it as notice of an assignment, and we paid them for their receipt upon that footing. But no assignment was really necessary, the mere delivery of the policies to the plaintiff being sufficient: *Rummens v. Hare*(¹). Moreover, the nature of the transaction between the plaintiff and the assured—of which the company had express notice at the time the policies were effected—necessarily implied a power to give receipts, for in such a case, as Lord Cranworth said in *Desborough v. Harris*(²), it is impossible for the insurance company to go into the equitable rights between the mortgagor and mortgagee, depending as they must on the state of the accounts, which are beyond the control of the persons bound to pay. *Brasier v. Hudson*(³), which was cited in that case, and where it was held that the first mortgagee of a fund could not alone give a receipt for the money, but that all other subsequent claimants must also concur, is disapproved of by Lord St.

425] Leonards: Sugden's *Vendors and Purchasers(⁴). It is unnecessary to take out administration in this case to the

(¹) 1 Ex. D., 169.

(²) 5 D. M. & G., 439, 458, 459.

(³) 9 Sim., 1.

(⁴) 14th ed., p. 665.

estate of the assured, as the money is payable to us as his "assigns" under the terms of the policies. Administration is only necessary where the money is payable to the executors or administrators. But the court may proceed in the absence of the legal personal representative: Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 44. We submit that the defendants might have been satisfied with the plaintiff's offer of an indemnity; or they might have paid the money on a statutory declaration of his title, which is fully proved by the correspondence. It was unnecessary to compel us to bring an action.

Davey, Q.C., and *Farwell*, for the defendants, were not called upon.

JESSEL, M.R.: The only question is, whether the insurance company were fairly warranted in refusing to pay the amount of these policies without a proper receipt. I am of opinion they were, and that they would have been acting very imprudently in paying it without. Of course the insurance company were perfectly at liberty, if they thought fit, to accept the indemnity of the plaintiff, but they did not so think fit.

The case is an exceedingly simple one. The first point is this. It is said that the letter of the 21st of October, 1870, coupled with the deposit of the policies, constitutes an equitable assignment under the act. I think it does not. The letter is exactly what it purports to be. The plaintiff was to instruct his solicitor to prepare an assignment of the policies. No consideration was stated, and there was no agreement to assign. There had been a deposit, and there was to be an assignment only if the plaintiff thought fit. For some reason or other he did not choose to take an assignment, but was content to rely on the deposit. Then, after the death of the assured, he gave notice to the office, on the 14th of September, 1875, through his solicitor, that he held the two policies as security for certain advances, and the company *gave a receipt for the notice in the [426 terms of the Policies of Assurance Act, 1867.

It was gravely argued before me that there was an assignment by virtue of this notice; that inasmuch as the company took 5s. for acknowledging the notice under the act, they ought not to have taken the 5s. unless the notice had been notice of an assignment. But it has been expressly admitted by the plaintiff's solicitors that there was no assignment, and yet the plaintiff now says that that notice made an assignment. Of course it did not. That is a case in which the argument need only be stated to see that it is not well founded.

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That was the second point. Then the third point was this: the man is dead; nobody proved his will; he has no executor, and no legal personal representative; but the plaintiff says to the company, "I am a deposit for value, I have given you notice of my security, and it entitles me to give a good receipt." In the first place, the question as to whether the debt is due or not is just the very question which the company want decided. How are they to find out whether the security is or is not a valid one? It is said they might have taken a statutory declaration. I know of no law which says that the company shall take a statutory declaration. The company were entitled to a legal discharge, which they have not obtained.

The case comes to this: A man in possession of a piece of paper, say a policy of insurance, goes, after the assured is dead, to the insurance office and says, "This was deposited with me as security for a debt; it is true I have no writing to show even that, for it was only a verbal deposit, but a good deal of money is due to me on the security, and I insist upon your paying me, on my receipt, without any communication with the executor of the debtor, because there is none, and without any proof beyond my assertion, either by solemn declaration or otherwise, that the money is due to me." Then he finds fault with the insurance company, who are men of business, because they say that is not satisfactory and they are not willing to pay, the whole difficulty having been occasioned by his own carelessness in not taking an assignment. Then he comes here and brings an action, which he was quite entitled to bring, and there I think I 427] can help him, *because, under the power conferred on me by the Legislature, and under the circumstances of the case, seeing that it is sufficiently proved that the money is really due, I can do without the legal personal representative. The 44th section of the act, 15 & 16 Vict. c. 86, which confers that power, is undoubtedly still in force, for although it is not incorporated by express provision in the new Judicature Rules, yet it is saved by the note at the commencement of the rules, and I have acted upon it recently. I shall, therefore, declare that, it appearing that this is a case in which the presence of the legal personal representative may be dispensed with, the suit may proceed in the absence of the legal personal representative. There will, therefore, be judgment for payment by the company to the plaintiff of the amount due; and as the company ought certainly to be indemnified against all the costs of the action, which have been occasioned entirely through the plaintiff's negli-

gence, I shall give them their costs, to be deducted out of the amount.

On the question of interest,

Chitty submitted, that inasmuch as by virtue of the defendant's letter of the 7th of October, 1875, the principal was payable on a day certain, the plaintiff was entitled to interest at 4 per cent. from that day.

Farwell: Until now, the plaintiff has not been able to give us a legal discharge for the money. It does not necessarily follow that because money due on a policy of assurance is to be paid on a day certain, interest is chargeable in default of payment on that day. A court of equity will not allow interest where there has been no legal hand to receive the money: *Wolfe v. Findlay* (').

JESSEL, M.R.: In that case the money was not payable at a day certain. The case was simply this. A firm in India collecting the estate of a dead man under a power of attorney from the administratrix, knowing it was trust money, transmitted it to their agents in London with notice of the trust. The agents kept the money for ten years, and mixed it with their own moneys, and *it was held that they [428 were not liable to pay interest, merely because no application had been made during the ten years for payment of the money into court. With the greatest possible deference to Vice-Chancellor Wigram, who decided that case, I should have decided the contrary on the very plainest principles of equity. The agents were admittedly trustees of the money, and they might have invested it in consols at any time. I should never have allowed them to keep it for ten years and mix it with their own moneys. I recollect that the late Master of the Rolls, in a similar case, of *Barlee v. Murietta*, declined to follow *Wolfe v. Findlay* ('). It is clear that these defendants must pay interest at 4 per cent. from the 7th of January, 1876, the day on which the money was payable.

Solicitor for plaintiff: *H. Philbrick*.

Solicitor for defendants: *G. Debenham*.

(') 6 Hare, 66.

[4 Chancery Division, 428.]

M.R., Dec. 15, 1876.

MARTIN V. GALE.

[1876 M. 238.]

Infancy—Voidable Deed—Assignment to secure Money advanced for Necessaries.

A deed by an infant to secure the repayment of money advanced for necessaries is voidable.

Where the plaintiff had advanced money to an infant partly in order to pay for necessaries, and he had by deed assigned to the plaintiff his reversionary interest as a security,—in an action brought against the infant on his attaining twenty-one, for an account of moneys advanced to him and expended on necessaries, and for repayment, and also claiming that the same might be declared to be a charge on his reversionary interest:

Held, that, though the plaintiff was entitled to an account and an order for repayment, the deed was not binding on the infant, and the security could not be enforced.

THIS was a motion on the admissions in the statement of defence under Rules of Court, 1875, Order XL, rule 11.

By an indenture, dated the 9th of June, 1875, and made between Mrs. Gale, the mother of the defendant, William 429] Charles *Gale, of the first part, the said defendant of the second part, and the plaintiff of the third part, after reciting that the defendant had not then attained the age of twenty-one years, and that Mrs. Gale had applied to the plaintiff to advance her £150 for the purpose of enabling the defendant to get clothes and other necessaries, and that she had proposed to become security for the repayment thereof, it was witnessed that in consideration of the sum of £150 then advanced, Mrs. Gale and the defendant jointly and severally covenanted with the plaintiff for payment to him of the said sum and £10 per cent. interest, and the said Mrs. Gale as to her life interest, and the defendant as to his reversionary interest, assigned to the plaintiff certain sums of stock therein mentioned as a security for the repayment of the said sum and interest.

The defendant having attained the age of twenty-one, the plaintiff brought this action, alleging the before-stated indenture, and also alleging that the said sum was advanced to enable the defendant to pay debts which he had incurred for necessaries, and also to buy other necessaries, and upon his representation that he would expend the same upon necessaries for himself, and alleging that the same was so expended.

The defendant by his statement of defence denied that he had received more than £95 of the said sum of £150, but admitted that he had expended about £60, part thereof, on

necessaries. He pleaded his infancy, and submitted that the action ought to be dismissed as against him, with costs.

The plaintiff now moved on the said admissions in the statement of defence, 1, for an account of all moneys advanced by the plaintiff to or on account of the defendant before he attained twenty-one years of age, and expended by him on necessaries or in paying debts incurred for necessaries, and the dates of such advances; 2, for an inquiry whether any and which of such sums had been repaid, and when; 3, for an order for repayment of the amounts found due, with interest at £4 per cent., and the costs of the action; 4, a declaration that the said amounts, with interest, and the costs of the action were a charge on the defendant's reversionary interest in the sums of stock in the statement of claim mentioned, and that the said reversionary interest might stand charged accordingly; 5, in default of payment, for foreclosure.

**Farwell*, for the plaintiff: 1. An infant is liable [430 to repay money lent to him for, and expended by him on necessaries. The person advancing the money stands in the place of the tradesman who supplies the necessaries: *Marlow v. Pitfield*(¹). The plaintiff is therefore entitled to an inquiry in the terms of the notice of motion, which is framed on the inquiry directed in *Jenner v. Morris*(²). He is also entitled to an order for the payment of the amount found due on such inquiry.

2. An infant can give security for money lent to him for, and expended by him on necessaries. An infant can himself do that which he can be compelled by process of law to do: *Coke upon Littleton*(³). He could have been compelled to charge his interest in these sums of stock; the plaintiff might have sued him at law, and recovered judgment against him, and have had such judgment declared a charge on these sums of stock under the Judgment Acts, as was laid down by Lord Justice James in the case of *In re Howarth*(⁴), where his Lordship said: "I apprehend that here, if the mother were to sue the petitioner for necessaries supplied to him, a judgment would be obtained by which his inheritance would be bound."

The plaintiff would thereby have become an equitable mortgagee, and therefore entitled to foreclosure. The defendant could therefore bind his interest by this mortgage.

Further, an infant can bind his estate by a deed which is for his own benefit. "If an infant bargain and sell his land

(¹) 1 P. Wms., 558.

(²) 3 D. F. & J., 45.

(³) Page 171 a.

(⁴) Law Rep., 8 Ch., 415, 418.

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for money, for commons, or teaching, it is good with averment; if for money, otherwise": Bacon on Statute of Uses⁽¹⁾.

[JESSEL, M.R.: "Good" in that passage must mean "voidable" as distinguished from "void."]

In *Maddon v. White* (²), Buller, J., said: "All the modern cases have expressly held that an infant cannot avoid a lease which is for his own benefit; and Lord Mansfield, in 431] *Drury v. Drury* (³), *laid it down as a general principle that if an agreement be for the benefit of an infant at the time it shall bind him. Lord Hardwicke afterwards adopted this rule."

[JESSEL, M.R.: There must be some mistake in the report of what Buller, J., is stated to have said. No case can be found in which Lord Mansfield or Lord Hardwicke had laid down any such general principle.]

In this case it was for the infant's benefit to escape the costs of an action for the amount of the debt; an infant might starve if he could give no security. It cannot be for the infant's benefit to drive the creditor to obtain a charging order.

Davey, Q.C., and *W. G. Walker*, for the defendant, were not called on as to the second point.

JESSEL, M.R., made an order in the terms of the 1st, 2d and 3d paragraphs of the notice of motion above set out, except as to the costs of the action, which he reserved, and then proceeded:

There is no doubt, as a general rule, that deeds by infants are voidable. That has been decided in several cases, one of which is the well-known decision in *Lumsden's Case* (⁴). There have been cases where a deed was executed in pursuance of an express obligation on the infant to execute the deed, and other cases in which the instrument was a mere accessory to some other act which he was bound to perform; but they are well-known exceptions, which are very plain and very simple. This case has no relation to them whatever.

This is a case in which an infant borrows money of a money lender, and executes a charge by deed on his reversionary interest. Of course there is no legal obligation upon him to execute any such deed. The mere fact that a portion of the money was wanted for necessaries does not impose on him any such legal obligation. It is quite clear,

(¹) Law Tracts, p. 355.

(²) 2 T. R., 159, 161.

(³) Dom. Proc., 26 May, 1762.

(⁴) Law Rep., 4 Ch., 31.

therefore, that that deed is not binding upon him until he attains the age of twenty-one years.

Then it was said that, although it was not binding on him directly, it might be binding on him indirectly; and I was referred to *In re Howarth*⁽¹⁾, which was a decision of the Lords Justices *relating to the jurisdiction of the [432 court as *parens patriæ* in charge of infants' estates, in which reasons are given for the exercise of the jurisdiction. But those reasons seem to me to have no bearing whatever on the consequences of an act done by an infant. The court may, by acting under a delegated power which the Crown possessed, being the guardian of all infants, be enabled to charge an infant's property when he could not charge it himself; and the very reason which may render it necessary for the court to do it is that the infant cannot do it without; therefore, if the court could not do it, nobody could do it. It seems to me, therefore, that, as far as the reasons which are given go, they rather show that the infant could not do it. I think that there is no foundation for the argument which has been adduced before me that this deed is binding on the infant.

Solicitors: *C. R. S. Hooper; Halse, Trustram & Co.*

⁽¹⁾ Law Rep., 8 Ch., 415.

See 13 Eng. R., 73 note; 17 Eng. R., 129 note; 18 Eng. Rep., 201 note; 18 Am. Law Review, 280.

This case seems to hold that although the infant would be liable for moneys loaned to purchase necessities, yet that a security for the repayment thereof could be avoided by the infant on account of his infancy.

An infant is liable for moneys lent, to pay for necessities, which is so expended: *Randall v. Sweet*, 1 Denio, 460; *Smith v. Oliphant*, 2 Sandf., 306.

And in such case the action may be brought for moneys *lent and advanced*: *Smith v. Oliphant*, 2 Sandf., 306, 308.

Though not for moneys *had and received*: *Smith v. Oliphant*, 7 N. Y. Leg. Obs., 17.

Where an infant, being liable in tort to the owner of a horse for wrongfully driving and injuring the same, gave the owner of the horse his note in settlement for such injuries it has been held, in a suit upon the note, defendant was liable *upon the note* to the same extent that he would have been

in an action on the cause that formed its consideration, and that his infancy was no defence: *Ray v. Tubbs*, 50 Vermont, 688.

In this case the court (pp. 694-5) said: "The referee has found that the horse was overdriven, and died from the effects of such overdriving. The overdriving which produced his death, was upon a route not embraced in the contract of bailment; and upon the authority of the cases cited, the defendant was liable in an action of tort, notwithstanding his infancy, for his value.

"The note upon which this action is predicated was given in settlement of the claim for which the defendant was so liable. It is now claimed that the tort was merged in the note, and that no recovery can be had upon the note under the elementary rule, that the notes of an infant are voidable.

"The rule of the common law was, that the note of an infant given for necessities was voidable. But in *Bradley v. Pratt*, 23 Verm., 378, the court

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held that the note of an infant given for necessities was binding; and that the liability of an infant did not depend upon the form of action, but upon the consideration upon which the claim is based. This seems to us to be a reasonable rule, and that in its application the infant is not deprived of any right which it is the object of the law to accord to him. An infant, under certain circumstances, may pledge his credit for necessities; and if his promise to pay for such necessities is evidenced by his note, the note is collectible. The law makes him liable for his torts; and where he elects to settle such liability by giving his note, as long as the consideration for the note is open to inquiry, we see no reason why he should not be held liable in an action upon the note to the same extent that he would be if the action had been brought upon the cause of action which formed the consideration for the note. The note in suit having been given in settlement of a claim for which the defendant was liable, and no fraud nor imposition having been practised in obtaining it, the plea of infancy is not available to defeat it."

It has been held that one who has paid off a mortgage on the land of infants cannot maintain an action against them for money had and received, or money lent, although the mortgage was paid off at the request of their guardian: *Bicknell v. Bicknell*, 111 Mass., 265.

This case is unquestionably good law, for if the land were not worth as much as the mortgage the infant would not be benefited by the *excess*; but if the lender had brought suit in equity and asked to be subrogated to the rights of the mortgagee in the mortgage paid, it seems to us he would have been granted the relief. So if the infant had parted with the land, it seems to us the lender might have brought suit stating all the facts, and asked to recover the amount which his payment had *benefited* the infant's estate, and which the infant had received in consequence of the additional amount he received for the land in consequence of the payment of the mortgage.

See *Smith v. Oliphant*, 2 Sandf., 308-9; *Tyler on Infancy*, 103, § 61; 1 Sto. Eq. Jur. (12th ed.), § 240; *Davies v. Austin*, 1 Ves. Jun., 249.

As to the validity of a contract by a father with his son to emancipate him, see *Bannister v. Bannister*, 44 Verm., 624.

Infancy is a bar to an action on the case for false and fraudulent representations by a vendor or pledgor as to his ownership of property sold or pledged: *Doran v. Smith*, 17 Amer. Law Reg., N.S., 42, 44 note, 49 Verm., 353.

All gifts, grants or deeds made by infants by matter in deed, or a writing, which takes effect by delivery of his hand are voidable by himself, his heirs, or those who have his estate. The heirs of an infant may disaffirm his deed within the same time that the infant might himself if living: *Illinois, etc., v. Bonner*, 75 Ills., 315.

A contract made by a father in his infant son's name, and without the knowledge of the son, is of no binding force upon the son until he has in some way assented to it, and does not, therefore, of itself confer upon him any rights.

The real force and effect of the son making his own, by adoption, the contract thus made in his name by his father, is to retrospectively make the father his agent, or to give the father authority retrospectively, by claiming as his own that which without authority at the time was made in his name.

An infant cannot empower an agent or attorney to act for him; and he, therefore, cannot affirm what another has assumed to do in his name as an agent or attorney. He cannot affirm what he could not authorize. The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods.

There can be no presumption that the gift to an infant of a contract for the purchase of land at the price of thirteen thousand dollars, and upon which only four hundred dollars has been paid, is for the benefit of the infant; and even if he were an adult, acceptance could not be presumed, of a contract binding him to the payment of a large sum of money, in the absence of express evidence to establish it.

The gift by a father to his minor son, of a contract for the purchase of land, which he had before made in the son's name without his knowledge, will not entitle the son to recover back from the vendor the payment which the father

had before made on the contract. The right to repudiate a contract is not the subject of gift.

An infant has no right during his minority to disaffirm a voidable contract of purchase: *Armitage v. Widoe*, 36 Mich., 124.

Where the person who is appointed guardian in a special proceeding has interests antagonistic to the infant, which facts appear on the face of the proceedings, a sale thereunder will be void as against the infant: *O'Connor v. Carver*, 12 Heisk. (Tenn.), 436.

Where a minor has rendered services in accordance with the terms of a contract entered into by himself, and has received payment for the same, such payment is a full satisfaction for the services, and the minor cannot a second time recover therefor: *Murphy v. Johnson*, 45 Iowa, 57.

The contract of an infant may be ratified by an oral promise, made after he comes of age, to pay the debt.

It is not necessary that the person ratifying his contract, made as an infant, should know that he is not legally bound at the time he makes the new promise: *Ring v. Jamison*, 2 Missouri App. Rep., 584.

Where a guardian makes a sale of property under a void decree of the court, if the ward, after arriving at maturity, receives the purchase-money, it will amount to a confirmation of the sale and work an estoppel: *Parmalee v. McGinty*, 52 Miss., 475; *O'Connor v. Carver*, 12 Heisk. (Tenn.), 436.

See 12 Eng. Rep., 382 note; 18 id., 319 note; *Black v. Dressell*, 20 Kans., 153.

Where, at the time of digging a channel, the lands now belonging to plaintiff in error were the property of a minor, held by said minor under a will, and where no legal proceedings were had to acquire the right to the use of any portion of the stream, and no conveyance or permission obtained from the executor of said will and guardian of said minor, the mere knowledge on the part of said executor and guardian that said company was engaged in digging said channel, and failure on his part to object to said work or to take measures to prevent it will work no estoppel upon the minor, or prevent said minor from afterward asserting her right to the flow of the entire stream in its natural channel: *Shamleffer v. Council, etc.*, 18 Kans., 24.

[4 Chancery Division, 435.]

V.C.M., Dec. 19, 20, 1876.

*KING V. GEORGE.

[435]

[1876 K. 193.]

Will—Construction—General Bequest—Articles specifically enumerated—Ejusdem Generis.

A testatrix made her will in these words: "I, S. G., do bequeath to A. G. all that I have power over, namely, plate, linen, china, pictures, jewelry, lace, the half of all valued to be given to H. G.; the servants in the house who have been a year with me to receive £10, and clothes divided among them; also all kitchen utensils:

Held, that the bequest was not limited to the articles specifically bequeathed, but that the will passed the whole of the personal estate of the testatrix.

THE will of Sarah George, dated the 25th of May, 1874, was as follows: "I, Sarah George, do bequeath to A. K. George all that I have power over, namely, plate, linen, china, pictures, jewelry, lace, the half of all valued to be given to Herbert George, son of Frederick George. The servants in the house who have been a year with me to

receive £10, and clothes divided among them. Also all kitchen utensils." The testatrix, in addition to the articles comprised in and specifically bequeathed by her will, was possessed of moneys and securities for money at her bankers, furniture, horses and carriages, wines, and other personal estate of considerable value to which the plaintiffs, who were her next of kin, claimed to be entitled. The defendant, A. K. George, however, claimed on behalf of himself and Herbert George to be entitled to the whole of such personal estate under the terms of the will. The question was raised upon demurrer whether A. K. George and Herbert George took the whole of the personal estate of the testatrix, or only the articles specifically bequeathed.

J. Pearson, Q.C., and *Rigby*, for the demurrer: This is a very short and simple will, but it raises a question which has on various occasions been argued before the Courts of Chancery, and the authorities have not always been uniform. The first question is as to the intention of the testatrix. Did she intend to die intestate as to any portion of her property? because she had considerable property both 436] real and personal besides that *which is comprised in the words she has used. It is submitted that the first part of the single clause of this will, "I bequeath all that I have power over," clearly denotes that she intended to give everything she had. If so, can it be said that these words are cut down by an enumeration of the articles following the general bequest? The leading authority upon this subject is *Bridges v. Bridges* ⁽¹⁾, where the testator said: "I give the remainder of my estate, namely, my Bank stock, India stock, South Sea annuities, to my son, B. Bridges, and I do hereby make him sole executor." It was there held that the enumeration of certain specific property did not cut down the general gift of the remainder of his estate. That decision has been acted upon ever since, and particularly by Sir W. Grant in *Chalmers v. Storil* ⁽²⁾, who referred to *Bridges v. Bridges* and followed it without hesitation; so also did Sir W. Page Wood in *Dean v. Gibson* ⁽³⁾, and he also cited *Bridges v. Bridges* as a leading authority, as well as *Chalmers v. Storil* and *Ellis v. Selby* ⁽⁴⁾. *Hodgson v. Jex* ⁽⁵⁾ is an authority that the meaning of the words "other effects" will not be abridged by an enumeration of specific articles, and *In re Kendall's Trusts* ⁽⁶⁾ is equally conclusive.

⁽¹⁾ 8 Vin. Abr., "Devise," 295, pl. 13.

⁽²⁾ 2 V. & B., 222.

⁽³⁾ Law Rep., 3 Eq., 713, 715.

⁽⁴⁾ 7 Sim., 352, 364.

⁽⁵⁾ 2 Ch. D., 122.

⁽⁶⁾ 14 Beav., 608.

Glasse, Q.C., and *Cary*, in support of the bill: The case of *Bridges v. Bridges*, and those which have followed it of a similar kind, cannot stand with *Timewell v. Perkins* ⁽¹⁾, where the words were, "all my freehold lands in the tenure of the widow L., and the residue of my estate consisting of ready money, plate, jewels, leases, mortgages, or any other things wheresoever or whatsoever I give to A. H. or her assigns forever." There the court held that there was an intestacy as to all the unspecified real estate, because there was no clear intention to pass it. This is an authority by which the court must be bound. *Trafford v. Trafford* ⁽²⁾ is quite as strong, and *Enohin v. Wylie* ⁽³⁾ is a clear case in our favor; and the observations of the Master of the Rolls in **In re Kendall's Trusts* ⁽⁴⁾ show that but for the [437 concluding sentences of the will he would have decided differently. *Stukeley v. Butler* ⁽⁵⁾ is an authority as to the effect of the word "*videlicet*," and the case of *Enohin v. Wylie* ⁽⁶⁾ is one of the highest authority, having been decided by the House of Lords. There the words were, "The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me," and all the judges were unanimous in deciding that those words were not merely a defective enumeration, but a description comprising the whole of the gift; and that the testator's property in the English funds was undisposed of. To decide in favor of the defendant's contention would be to go very far beyond the effect of any previous decision. In all cases of imperfect enumeration reported, it will be found that, apart from such special circumstances as existed in *In re Kendall's Trusts*, they may be reduced to three classes: First, where the articles enumerated are found to comprise the bulk of the testator's property, as in *Bridges v. Bridges* ⁽⁷⁾ and *In re Goodyar* ⁽⁸⁾, decided on the authority of *Fisher v. Hepburn* ⁽⁹⁾; secondly, where, as in *Dean v. Gibson* ⁽¹⁰⁾, the word "money" has been used; and thirdly, cases where the words used have been of so wide and varied a meaning that no class can be found for them less extensive than that of general personal estate. Here the words are of the most trivial kind, "plate, linen, china, pictures, jewelry, lace," articles easily classified under the head of domestic ornaments and the like, comprising only a very small portion of

⁽¹⁾ 2 Atk., 102.

⁽²⁾ 3 Atk., 347.

⁽³⁾ 10 H. L. C., 1.

⁽⁴⁾ 14 Beav., 608.

⁽⁵⁾ Hob., 168.

⁽⁶⁾ 8 Vin. Abr., "Devise," 295, pl. 13.

⁽⁷⁾ 1 Sw. & Tr., 127.

⁽⁸⁾ 14 Beav., 626.

⁽⁹⁾ Law Rep., 3 Eq., 713, 715.

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the property of the testatrix, and having no reference to money or other general words.

The gift of £10 to each of the servants also shows that the testatrix must have intended the rest of her property to descend to her next of kin, who could pay the legacies out of the other property. These specific articles are to go to two individuals named, and it cannot be supposed that they were to pay the legacies out of the sale of those effects.

438] **J. Pearson*, in reply: As to the case of *Wylie v. Wylie* ⁽¹⁾, it is clear that the decision turned upon the intention of the testator, whether he meant to pass the stock in the English funds in addition to his Russian property, and it was not a decision affecting the question in this case.

[*Glasse* referred to *Rawlins v. Jennings* ⁽²⁾ and *Wrench v. Jutting* ⁽³⁾.]

J. Pearson: In the latter case the question was as to the word "effects," and it was held that upon the construction of that particular will the word "effects" was not intended by the testator to have its most general operation, but only to pass things *ejusdem generis*.

. MALINS, V.C.: This will is a very curious one, and it has given rise to the very learned and able arguments which I have had the pleasure of hearing from the counsel on both sides. The will which I have to construe is in these very few words: [His Lordship read the will.] The question I have to determine is whether this will passes all the property of the testatrix, or whether it passes only that property which is enumerated under the words "plate, linen, china, pictures, jewelry, lace." If the construction is that it passes only those things, then the testatrix has to a great extent died intestate, for she had real estate, a house in which she lived, which has been contracted to be sold for a sum of £1,500, and she had also property of various other descriptions: and therefore, if she has died intestate with respect to the great bulk of it, the heir-at-law will be entitled to the real estate, and the next of kin will be entitled to most of the property.

Now, first, let us consider what was the intention of the testatrix. If she intended merely to give her plate, linen, china, pictures, jewelry and lace, she might have put it in that way, and have said, "I do bequeath all my plate, linen, china, pictures, jewelry, and lace to so and so." That 439] would have been a very simple form *of giving only those particular things. But it would have shown that

⁽¹⁾ 1 D. F. & J., 410.

⁽²⁾ 13 Ves., 39.

⁽³⁾ 3 Beav., 521.

ultra those things she did not dispose of anything, and intended to die intestate. But does this will show that intention? What does she mean when she says, "I, Sarah George, do bequeath to A. K. George all that I have power over"? If the will had stopped there, those words mean everything that she had testamentary power over; that is, all property which she could by her will dispose of. Then, having used those words, which are of general, comprehensive meaning, and as good words as could be used by the most skilful conveyancer—words abundantly sufficient to pass all her property—she goes on to enumerate, as is frequently the case, part of the property she has, not the whole of it, but only "the plate, linen, china, pictures, jewelry, lace." Now I cannot pretend to say that this is a will which any one would say is free from doubt, but to my mind it is clear that the testatrix did not intend to die intestate as to any part of her property, but that she intended, by the use of the words "all that I have power over," to give all her property of every description, and then foolishly and unnecessarily proceeded to enumerate part of them. Then, applying the rule in this case, that the first duty of the court is to ascertain what was the intention, and then, having done that, to see whether there are words to carry that intention into effect, I am satisfied the intention was to dispose of all her property, and I am of opinion, both upon principle and authority, that the words are sufficient for the purpose. This subject, where wills are made in comprehensive form followed by an enumeration, has been a subject of difficulty to judges for the last century and a half, and amongst the most eminent of them there has been a remarkable difference of opinion. But I cannot help thinking that the doctrine has been settled that where a testator gives his property generally by the words "all my property," or "all my estate," or "all that I have power over," as in this case, where he uses words sufficient to pass everything, and then proceeds to enumerate particulars—it is now, I think, pretty well settled that an enumeration of particulars does not abridge or cut down the effect of the general words.

Now, beginning with the first case which was cited by Mr. Pearson, decided by a very eminent authority, that of Lord King, **Bridges v. Bridges* (¹). That is a case [440 which has been cited and acted upon to a very great extent, I may say, ever since the decision was given, and I think it is a stronger case for a limited construction of the will than this is. Sir Brook Bridges gave certain things to his daugh-

(¹) 8 Vin. Abr., "Devise," 295, pl. 13.

ters and others, and then there was the following clause: "I give the remainder of my estate, namely," as in the present case, "my Bank stock, India stock, South Sea stock, South Sea annuities, to my son B. Bridges, and I do hereby make him sole executor." If this limited construction can be held to prevail, that was as clear a case as could be. If he had said, "I give him my Bank stock, India stock, South Sea stock and annuities," nothing more than those would have passed, because it would have been the only subject of the gift. But when he says, "I give the remainder of my estate," it shows that he intended to give everything, and the enumeration did not cut down the general disposition. Lord King, L.C., was of opinion that the latter words which came under the "viz." did not restrain the general words precedent, "the remainder of my estate," but were added by way of enumeration or description of the main particulars whereof his estate did consist, and not to restrain the word "estate" to those particulars, and the rather because immediately after follow the words "and I do hereby make him sole executor of this my will; and when he disposes of the remainder of his estate it is plain he did not intend to die intestate as to any part of it." That is the criterion: did the testator, or did he not, his object being to dispose of all his property, intend to die intestate as to any part? and Lord King says he did not, because he gives all the residue of his estate, and then he makes an imperfect enumeration of what it consists. I am bound to say it is very difficult to reconcile the decision of Mr. Justice Fortescue in *Timewell v. Perkins* ⁽¹⁾ with the decision in *Bridges v. Bridges*. But it is not necessary to do that, because I do not think, upon the whole, that *Timewell v. Perkins* has been considered as an authority so binding as that of *Bridges v. Bridges*, decided by Lord King, and I think I do sufficient to show that by going at once to the 441] decision in *Chalmers v. Storil* ⁽²⁾. I cannot cite a higher authority than that of Sir William Grant, than whom no man more clearly and comprehensively grasped the details of all the cases which came before him. It is a case in which Alexander J. Chalmers disposed of his property thus: "All my estates whatsoever to be equally divided among them, whether real or personal, making no distinction in favor of the male, as it is my intent that my daughter shall have an equal share with my son of all my property after paying the following legacies," specifying two annual sums to two persons for life, and at their deaths to devolve

⁽¹⁾ 2 Atk., 102.

⁽²⁾ 2 V. & B., 222.

to his children equally. Having made a general disposition of all his property, real and personal, the testator then specified the property bequeathed by him as consisting of freehold ground rents, money on mortgage, American bank stock, an estate in America, &c., and proceeded thus: "It is my further will and intention, that in case of the death of my dear wife, Anna Maria Chalmers, the portion or part hereinbefore bequeathed her shall descend to my two children equally; and in the event of both their deaths before her, she shall enjoy during her life the portion or parts left or bequeathed by me in this instrument unto them; and in the event of the deaths of my said dear wife and two children (that is to say, supposing my two children, now infants, die without issue), it is my further will that my mother and sister Francina before mentioned shall inherit after them the whole of the said properties during their lives, and after their death that it should go in regular descent to the children of my sisters." The testator appointed his wife and the defendant Storil his executors. The bill contended that the plaintiffs, the two infant children, were entitled each to one full third part of the clear residue of the testator's real and personal estate, and that the plaintiff, the widow, was entitled to the other third for life, with remainder to the two children in case they survived her, and that the widow ought to be put to her election as to the right to her dower, and so forth. The Master of the Rolls, Sir William Grant, says, "As to the question whether the whole personal estate passes by the will, my opinion is that it does. The testator gives all his estate whatsoever, whether real or personal"—here it says, "all I have power over," which is as comprehensive—"to be divided between his wife and children. The subsequent enumeration of what he supposed his property *to consist does not limit the gift to the particulars [442 specified. Intending to give everything he could, he has incorrectly stated what he had. In the case of *Bridges v. Bridges* (') the words were more restrictive, 'viz.,' being immediately added to the gift of the remainder of the estate, but Lord King's opinion was that the words following the 'viz.' did not restrict the preceding general words, but were added by way of enumeration or description of the chief particulars whereof his estate consisted, which construction was strengthened by the words immediately following appointing his son sole executor; and when the testator disposed of the remainder of his estate, it was plain that he did not intend to die intestate as to any part of it. Here

(') 8 Vin. Abr., "Devise," 295, pl. 13.

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the testator disposes of the whole of his personal estate, and therefore does not mean to die intestate as to any part of it." In my opinion every word of that is applicable to the present case.

Then this subject has been a matter of consideration very recently in the case of *Dean v. Gibson* ⁽¹⁾. That, I think, is a stronger case for the conclusion I arrive at than the present. Alice Gibson Maw, spinster, made her will in the following terms: "I, Alice Gibson Maw, being perfectly collected and in my right mind, wish to express my earnest desire that my personal property,"—that is, all her personal property,—“consisting of money and clothes, shall be equally divided amongst my three surviving sisters.” The question was, whether the general estate passed, that is, that part of her property which was neither money nor clothes. The Vice-Chancellor Sir William Page Wood, in 1867, decided thus: "There is a case, if I remember right, before Vice-Chancellor Sir L. Shadwell, resembling the present ⁽²⁾. The question also is touched upon in Mr. Roper's book on Legacies, under the chapter entitled 'Rights of Specific Legatees.' A case of *Bridges v. Bridges* is there cited, and Lord King held that not those particular funds only, but the whole residuary estate, passed; the specification not being added in a restrictive sense, but as an enumeration of the chief particulars of which the estate consisted. Then the reader is referred to *Chalmers v. Storil* ⁽³⁾, 443] in which Sir William Grant *followed Lord King's decision." This is Vice-Chancellor Wood in 1867, acting on *Bridges v. Bridges* ⁽⁴⁾ and *Chalmers v. Storil* ⁽⁵⁾, and coming to the conclusion that "my personal estate consisting of money and clothes" passed everything besides money and clothes.

Now, this testatrix sitting down to make her will, which is a holograph will, intending, as I am satisfied, to give all the property she has, thinks it not sufficient to give "all I have power over," but she goes on to specify part of her property, not for the purpose of restricting it, but for the purpose of allowing it to remain as it was originally, universal. Then Mr. Glasse says, "all" could not have been intended, because she makes two specific dispositions. She says "all I have power over," and then it is to be divided between two persons, the original legatee being one, and she says: "The servants in the house who have been a year with me to receive £10 and clothes divided among

⁽¹⁾ Law Rep., 3 Eq., 713.

⁽²⁾ *Ellis v. Selby*, 7 Sim., 352, 364.

⁽³⁾ 2 V. & B., 222.

⁽⁴⁾ 8 Vin. Abr., "Devise," 295, pl. 13.

them ; also all kitchen utensils." There is nothing inconsistent with that, because she says all that I have in the world over which I have power, but out of what I have £10 is to be given to the servants who have been a year with me, and my clothes and the kitchen utensils. These authorities, *Bridges v. Bridges*, Lord King's decision, *Chalmers v. Storil*, Sir William Grant's decision, *Dean v. Gibson*⁽¹⁾, Vice-Chancellor Wood's decision in 1867, are all perfectly consistent, and all bear out the construction which I put on this will. *Timewell v. Perkins*⁽²⁾, I have said, it would be difficult to reconcile with these authorities. I do not think it is reconcilable, and I think that this case of *Timewell v. Perkins* is not an authority to be followed. With regard to *Trafford v. Trafford*⁽³⁾, looking at the note in page 140 of Atkyns, the same observation may be applied to that. With respect to the case of *In re Kendall's Trusts*⁽⁴⁾, what is said by Lord Romilly is not an authority in point, because he had before him a will which concluded with a passage giving all the residuary estate, and all that Lord Romilly cited it for was to show that if that clause had not been in, he would have come to a different conclusion. That is not any authority standing in the way of my decision in this case.

*Now the authority that I have found most embarrassing is that of *Wylie v. Wylie*⁽⁵⁾. That is a very remarkable case, in this respect: that upon the construction of such a will all the judges who gave their opinions on it were unanimous. First, Vice-Chancellor Sir W. P. Wood; secondly, the Lords Justices Knight Bruce and Turner—that is three; then in the House of Lords, under the title *Enohin v. Wylie*⁽⁶⁾, Lord Westbury, Lord Cranworth, and Lord Chelmsford, all perfectly agreeing that in that case the general residue, that is, that part of the testator's property which consisted of money in the funds in England, did not pass. But I am bound to say that I come to the conclusion that the decision did not proceed on the ground of the enumeration of the property being erroneous or defective, but upon that which they considered to be the intention of the testator. And in that view, of course I assume that it was right. Such an array of authorities must be binding on the court. In that case Sir John Wylie, who was an eminent English physician, had been long resident in Russia, where he seems to have been possessed of very

(1) Law Rep., 3 Eq., 713, 715.

(2) 2 Atk., 102.

(3) 3 Atk., 347.

(4) 14 Beav., 608.

(5) 1 D. F. & J., 410.

(6) 10 H. L. C., 1.

considerable property, and he made, as I collect, his will in Russia. In making this will was it his intention to dispose of all his property, wherever it might be, or was he disposing of his Russian property only? My opinion is that the House of Lords and the judges in the courts below must have proceeded on the ground that he intended to dispose of his Russian property only. And, accordingly, I find Lord Westbury puts it on that ground; if he intended to dispose only of his Russian property, the money in the English funds would not pass. He says: "I dispose of all my movable and immovable property honestly acquired by myself in the following manner." If he had only used these words, "I dispose of all my movable and immovable property," everything in the world would have passed. Then he goes on to describe the property in St. Petersburg, his household furniture there, his farms and his country house in the neighborhood, all of which, together with the peasants "(excepting only those of my serfs who for their faithful and zealous services to my person shall be set free), and all my woodlands, with farms and country houses, and in general with all the economical establishments therein, 445] I destine to be sold. *The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me, shall be divided into ten equal parts." Now, did he intend to give the money and proceeds, and all the above, that is, the property in Russia, "as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me"? That was a question of intention. It was not an erroneous enumeration of property. It was not a case in which he said, "I give all my estate," and then proceeded with the enumeration of it, but it was a bequest by which he gave certain property, with respect to which all the learned judges came to the conclusion that he did not intend to dispose of his property in the English funds, and they mainly proceeded on the ground that he was directing the disposition of his Russian property, and restricted it to that.

Considering the eminence of such authorities as Lord King, who was one of the greatest lawyers, whose authority in this case of *Bridges v. Bridges* (¹) has been so long relied upon, and the authority of Sir William Grant in *Chalmers v. Storil* (²), if it had been the intention of the judges to overrule these they would have distinctly said so, and would not have left the profession in the difficult position of its

(¹) 8 Vin. Abr., "Devise," 295, pl. 13.

(²) 2 V. & B., 222.

being inferred that their decision was of a contrary nature. I assume, therefore, that it was contrary to their intention to overrule those authorities which have so long been acted upon, and I do not consider that I am hampered by *Wylie v. Wylie*(¹). It was in fact a different question, it was not whether a general gift of property should be cut down by defective enumeration, it was a question what was the original gift.

Now with respect to the other cases, I do not think *Fisher v. Hepburn*(²), which cited by Mr. Cary, is in opposition to the conclusion that I arrive at, because there the Master of the Rolls held that everything passed. The gift was in these words: "As to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever"—which are as comprehensive words as can be used—"canal shares, plate, linen, china, furniture, I give, devise, and bequeath the same to my said wife." That is a case, *therefore, [446 entirely in favor of the demurring parties in this case. If the words had stood there, "I give all my canal shares, plate, linen, china, and furniture to my wife," nothing else would have passed. But he says, "As to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, canal shares, plate, linen, china, and furniture, I give, devise, and bequeath the same to my wife." It is said that the words used took everything of that kind away, but the Master of the Rolls says, "I think these authorities do not affect or touch the case before me. The case of *Parker v. Marchant*(³) has been relied on in reference to the circumstance that the general words precede the enumeration. But, as was observed by Sir William Grant in *Cambridge v. Rous*(⁴), the latter are not words of restriction. They are rather words of enlargement. The object was to exclude nothing. Such an enumeration under a 'videlicet,' a much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles. This is only a common residuary bequest. I am of opinion that the debt in question passed under the residuary clause to the widow."

With regard to the case that Mr. Glasse referred to while Mr. Pearson was replying, and for which I was much obliged to him—the case of *Rawlins v. Jennings*(⁵)—the reason of the decision there is given in the passage that Mr. Glasse read to me, in which Sir William Grant says this: "The

(¹) 1 D. F. & J., 410.

(²) 14 Beav., 626.

(³) 1 Y. & C. Ch., 290, 301.

(⁴) 8 Ves., 26.

(⁵) 13 Ves., 39, 46.

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second question arises on the widow's claim of the whole residue of the personal estate as passing to her under the general word 'effects.' " Now that would clearly pass all the residue. Then Sir William Grant says: "That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word 'effects' must receive more limited interpretation, and must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence, viz., household furniture." Therefore, although the word "effects" would pass everything, yet when you find that, having given his wife all his shares, he gives other property afterwards, that, as Sir William Grant says, shows that he did not intend the word "effects" to 447] have its most general operation. With respect to *the word "effects" unqualified and unexplained, I entirely agree with the observations that were made by the Master of the Rolls in the case of *Hodgson v. Jex* (1), that when the word "effects" will include those things that are mentioned, that, as a general word, ought not to be cut down to things *ejusdem generis* with those named before, unless there is something clearly to show that that was the intention.

Upon all these grounds I am of opinion that this is a general disposition of the testatrix's property; the consequence of which is that the demurrer will be allowed, and the plaintiff, as the next of kin, has no interest in the estate. The costs will come out of the estate.

Solicitors: *H. Hill; Druce, Sons & Jackson.*

(1) 2 Ch. D., 122.

[4 Chancery Division, 448.]

V.C.B., Dec. 21, 1876.

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*JEFFERYS V. FAIRS.

[1876 J. 21.]

Specific Performance—Mining Lease.

A., on the application of B. and C., agreed to grant them a lease of a vein or seam of coal, called the S. vein, "about two feet thick, with the overlying and underlying beds of clay," on and under a farm called X., at £100 per annum as certain or dead-rent, and royalties of 9d. per ton for the coal and 4d. per ton for the clay; the lessees to have any part of the farm at the rent of £10 per acre, and to expend not less than £500 in the erection of a manufactory and buildings for the purpose of working the coal and clay; way-leave of 1d. per ton for foreign coal and clay; lessees to have power to determine the lease at the end of three years on giving one years' notice.

On action by A. for specific performance, B. and C. alleged that the S. vein did

not exist under the farm, and it was proved that on search it had not been found, but counter evidence was given to show that the searches were insufficient:

Held, that, under the agreement, B. and C. had, in consideration of the dead-rent reserved, obtained license to enter and search for the vein, but not a warranty that such vein was to be found; and, accordingly, that A. was entitled to specific performance of the contract whether the S. vein existed or not.

THIS was an action for specific performance of an agreement, dated the 6th of July, 1874, by which the defendants Fairs and Kirkhouse agreed "to take the vein or seam of coal called the Shenkin vein, and being about two feet thick, with the overlying and underlying beds of clay on and under the farm called Llwyndu, &c., Glamorganshire, such veins or beds being contiguous or in juxtaposition. Term sixty years from 29th September, 1874. Rent £100 per annum as certain or dead-rent, payable £25 at Lady Day, 1875, and £50 every subsequent half-year. Royalties 9*d.* per ton for the coal and 4*d.* per ton for the clay. Lessees to have any part of the farm above the Swansea Vale Railroad at the rent of £10 per acre, not being less than one acre, for the same term, and to expend not less than £500 in the erection of a manufactory and other buildings for the purpose of working the coal and clay. Way-leave for foreign coal and clay 1*d.* per ton. Lessees to have power to determine the lease at the end of the first three years of the term, on giving twelve calendar months' notice in writing to *the lessor. The lease to contain all proper and [449 usual covenants, including a three years' average clause in ascertaining the amount of royalties."

"Memorandum. This agreement is conditional on the taking of Messrs. Cory, Yeo & Co., being restricted to the lower or deeper veins of coal and other minerals as verbally arranged with them."

Pursuant to this agreement the defendants entered upon a portion of the land, which was on a mountain slope above the Swansea Vale Railway, and made excavations, and searched for coal and fire-clay, but did not succeed in finding the vein.

These operations were conducted by the defendant Kirkhouse, who was a mineral surveyor, and on the 3d of October, 1874, the defendant Fairs wrote to the plaintiff to inform him that they had completely failed in finding the coal, and that they had come to the conclusion that the vein of coal they were looking for must be running out there. They had found the fire-clay in its proper place, but of a very inferior quality, and no sign of any leader, such as they might expect, which would lead to the coal. "So we fear we must

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abandon it altogether, as it will not pay without we can make a good fire-brick to meet the market." In the course of the correspondence the plaintiff wrote: "I took for granted that you knew the coal could be got as well as the fire-clay, which latter seemed to be your principal object in taking the lease. I told you in my last that on the faith of your agreement I reduced the rent payable by Messrs. Cory, Yeo & Co. (who were working the lower or deep veins of coal) by one half, viz., £100 to £50; but I still hope you will persevere, and if you still fail I will consider to what extent I can fairly relieve you." In a subsequent letter the plaintiff reminded Fairs that his partner, the defendant Kirkhouse, being a mineral surveyor, "ought certainly to have satisfied you and himself about the coal before the agreement was made and signed." In the result, the defendants, considering that it was out of the question to work the fire-clay without the coal, declined to have anything more to do with the property, and had refused to pay the dead-rent, and also the rent for the surface land of which they had taken possession under the agreement.

450] *Under these circumstances the plaintiff commenced an action in which he claimed specific performance of the agreement of the 6th of July, 1874, and payment of the sums due for dead-rent under the agreement, and for rent of the surface land.

The case raised by the statement of defence was, that the defendants had entered into the agreement on the faith and in the assumption that there was coal to be got in the Shenkin vein; that they had ascertained by boring and searching in the ordinary way that there was no coal in the alleged Shenkin vein under the Llwyndu Farm, and that they accordingly repudiated the agreement, had given up possession of the land, and refused to pay any dead or surface rent, or to execute a lease.

In his evidence given in court, the plaintiff stated that the defendants came and applied to him for the lease, and proposed terms which were accepted by him. He knew nothing of the Shenkin vein, and was first informed of its existence by the defendants. There were no preliminary negotiations. Evidence was also given on behalf of the plaintiff to the effect that the defendants had not thoroughly and fairly tested the locality, as at the point selected by them the strata were loose, apparently indicating a slip of the ground caused by surface floods; and that although the Shenkin vein, which was visible, and being worked on the other side of the mountain three miles off, did not reach the trial hole

made by the defendants on the slope of the mountain, it was far from proved that the vein was not there; and in the opinion of the plaintiff's agent, who had assisted the defendants in their search, and was called as their witness, the experiments made were by no means conclusive or satisfactory.

Kay, Q.C., and *Howell Jeffreys*, for the plaintiff: The defendants cannot resist payment of the annual sum for fixed dead-rent, which is reserved for the land demised, whether the coal is worked or not, *Phillips v. Jones* ⁽¹⁾; and the reservation of a royalty for each ton of coal does not import into the contract a condition that there shall be coals capable of being worked: *Marquis of Bute v. Thompson* ⁽²⁾. Having taken the chance of the workings being more or less profitable, they cannot be released *from [45] their contract, especially as they did not embark in the speculation in consequence of any representation made to them by the plaintiff as to the existence of coal veins, or the probable chances of success in working them: *Mellers v. Duke of Devonshire* ⁽³⁾; *Jennings v. Broughton* ⁽⁴⁾. To coal mines, which are all liable to be interrupted by faults, the doctrine of *caveat emptor* is especially applicable, *Colby v. Gadsden* ⁽⁵⁾; *Ridgway v. Sneyd* ⁽⁶⁾; and the fact that property of such a speculative character has even turned out worthless, gives the defendants no right to repudiate their agreement: *Haywood v. Cope* ⁽⁷⁾. In this case a very feeble attempt only has been made to search for this vein, and the evidence goes to prove that it exists, and might have been found by a more thorough search.

Sir H. Jackson, Q.C., and *Bevir*, for the defendants: The agreement was to accept a lease of a specific vein of coal which has been found, after testing the property, to have no existence; and the effect of this total failure of the subject-matter, apart from any element of fraud, is to deprive the plaintiff of any right to specific performance, and to entitle the defendants to rescind the contract: Fry's Specific Performance ⁽⁸⁾; *Stanton v. Tattersall* ⁽⁹⁾. It is equally well settled that the vendor cannot recover from the purchaser upon a contract for the sale of goods, or shares, supposed to exist, but in reality either non-existent or worthless, and incapable of being transferred to the purchaser: *Hastie v.*

⁽¹⁾ 9 Sim., 519.

⁽²⁾ 13 M. & W., 487.

⁽³⁾ 16 Beav., 252.

⁽⁴⁾ 17 Beav., 234.

⁽⁵⁾ 34 Beav., 416.

⁽⁶⁾ Kay, 627.

⁽⁷⁾ 25 Beav., 140.

⁽⁸⁾ Page 251.

⁽⁹⁾ 1 Sm. & Giff., 529.

Couturier ⁽¹⁾; *Westropp v. Solomon* ⁽²⁾. In *Haywood v. Cope* there was a mine, the defendant saw it, and thought he would make a good thing of it, and having taken the chance, he was held bound by his agreement. But here there is no mine, and by directing specific performance the defendants would be ordered to take a lease of something which has no existence and cannot be obtained. We submit that in this, as in other cases, the burden of showing that the property 452] contracted to be demised *or sold does exist, is on the lessor; and as, upon the evidence, he has not complied with this condition, his action must be dismissed.

BACON, V.C.: The defendants contend that specific performance cannot be granted, and that they are entitled to repudiate the contract because the plaintiff has not proved the existence of the mine under the demised property. I have no doubt, however, that mining agreements are not dependent for their efficacy upon any such rule as that. What is the bargain between the parties? The defendants take their chance of finding that the property contains minerals and of getting all they can out of it. Even in the case of a mine in actual working, it may turn out most unprofitably. How, then, is the lessor responsible? What has he to do with it, unless I am to read the agreement as containing a guarantee on his part that the Shenkin vein existed under the demised property? I am clearly of opinion that I cannot do so. The defendants, knowing at least as much about it as the plaintiff did, apply to him for a lease for the purpose of working the fire-clay and the coal, the latter being necessary for working the former with advantage. He, not knowing anything about it, takes their word for the truth of the representation, and agrees to grant the lease. In the agreement there is not one word as to guaranteeing that there is this Shenkin vein, or that coal will be found under the property to be demised. All that it amounts to is a license to enter and search for the vein of coal, and make what they could of it. It has been said that a lease of minerals amounts to a sale and purchase out and out. In whatever sense that may be true, it can have no application to payment of a dead-rent which is reserved in respect of this license to enter and search, and is payable whether there is a vein of coal or not. What is there to exempt the defendants from paying the dead-rent because they have not yet succeeded in finding the vein? There is no analogy whatever to the case of a man selling shares which are utterly worthless, or a cargo of corn which had no existence. There

⁽¹⁾ 9 Ex., 102.

⁽²⁾ 8 C. B., 345, 371.

is nothing like fraud on the part of the lessor. The defendants have, in fact, got all they bargained for, which was *the chance of finding the vein of coal under the par- [453 ticular property, and a whole series of authorities shows that that is the true way of looking at transactions of this kind. It is true that in some of the cases there was an executed lease, but that is an immaterial circumstance. The important point is, whether the defendants got what they contracted for. They say they did not, and that, therefore, the bargain is bad. But I think that the thing bargained for was simply the right to go upon the land and search for and get the minerals, and make such a use of it as they thought fit. They knew the hazard attending it, and, knowing it, they protected themselves by having the lease made determinable at the end of three years. That is the protection which they have under the agreement. They have tried experiments, which appear not to have been very conclusive (for one of the witnesses says it was in the wrong place), and have not yet found any coal. It would be against reason, against justice, and against the whole chain of authorities to let the defendants off their bargain. The lessor has complied with his part of the bargain; and there is no reason why the dead-rent should not be paid.

The plaintiff is therefore entitled to judgment for specific performance, and an order for payment of the dead-rent that has accrued up to this time.

Solicitors: *Vizard, Crowder & Co.*, agents for John Gas-koin, Swansea; *Nation & Stephens*, agents for Richard Jenkins, Swansea.

[4 Chancery Division, 454.]

V.C.B., Jan. 11, 1877.

**In re COOKES' CONTRACT.*

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Will—Construction—Power of Sale of Real Estate—Tenant for Life—Whether co-Trustees and co-Executors surviving the Tenant for Life can sell.

Testator, after stating that he was desirous that a farm which he occupied should be carried on during the life of his wife for the maintenance, support, and benefit of herself and all his children, and that upon her death all his property both real and personal should be "fairly and equally divided" among "all" his children, and that the property which his three children by a former marriage had derived should be brought into hotchpot from the time of his decease, "so as to form one common fund," appointed his wife "and her two brothers, W. C. and R. C., trustees and executors" of that his will; and for the purpose of management authorized and empowered them to sell and convert into money all or any part of his said real and personal estates, or to mortgage or let the same or any part thereof, and invest the

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proceeds as therein mentioned. Testator directed and empowered his "said trustees and executors" to carry on the farm "by and out of" his assets "for the maintenance, support, and benefit of" his wife and children; and subject thereto declared that his real and personal estate, "and the proceeds thereof" should be held in trust for all his aforesaid children, in equal shares; the personal property to which the children by his first marriage had become entitled being brought into hotchpot, to be vested interests at twenty-one, or on death under that age leaving lawful issue:

Held, that upon the death of the widow the surviving trustees and executors had power to sell and convey the real estate without the concurrence of the children.

ADJOURNED SUMMONS. Aquila Robins, by his will, dated the 1st of October, 1831, after reciting that his family then consisted of his wife and four children by her, naming them, and of three children by a late wife, naming them also, and that the three last-named children were entitled as next of kin of an intestate, and under a will, to certain property, the amount of which was not then yet ascertained, proceeded as follows: "And whereas I am the owner of certain lands and hereditaments, and am also the occupier of the Hayfield Lodge Farm under lease, and am possessed of the stock and effects thereon, and of other personal estate; and whereas I am desirous that the said farm, or any other farm which I may occupy at my death, shall be carried on 455] during the life of my said wife, for the *maintenance, support, and benefit of herself and all my said children, and that upon her death all my property both real and personal should be fairly and equally divided among all my said children, and any other I may hereafter have; and that the personal property which my children by my first wife have derived from their grandfather and uncle shall be brought into hotchpot from the time of my decease, so as to form one common fund with the property which I may then leave; now therefore for carrying such intentions into effect I do hereby appoint my said wife and her two brothers William Cooke and Robins Cooke trustees and executors of this my will and testament, and I do hereby authorize and empower them to manage and conduct my affairs and business, and all matters relating to my real and personal estates (except as hereafter mentioned) for the benefit of my family, in such way and manner as they in their discretion shall think fit; and for that purpose I authorize and empower them to sell and convert into money all or any part of my said real and personal estates, or to mortgage or let the same or any part thereof, and to invest the proceeds arising from any sale or conversion into money which shall not be immediately wanted, in the funds or upon real securities, upon the trusts of this my will, and that their receipts shall be a good discharge and indemnity to all persons dealing

with them for all moneys which in such receipts shall be expressed to be received. And I direct and empower my said trustees and executors to carry on the aforesaid farm, or any other farm I may occupy on lease or otherwise at the time of my decease, by and out of my assets, for the maintenance, support, and benefit of my said wife and children; but I expressly declare that my said wife shall have the sole management of the said farm during such time as she shall remain my widow, without any interference or control on the part of my other executors. And it is my will that, subject to the provision hereinbefore contained for the maintenance and support of my said wife and children, my said real and personal estates and the proceeds thereof shall be held in trust for all my aforesaid children or any other child or children I may hereafter have, in equal shares and proportions (the personal property to which the children by my first marriage have become entitled under their grandfather and uncle being brought into hotchpot *from my decease as hereinbefore mentioned), and [456 to be vested interests at my death in such of them as shall then have attained the age of twenty-one years, and in the others of them when they shall severally attain that age, or on death under that age leaving lawful issue then living, and to be paid and payable to them as soon after the death or marriage of my said wife and the said ages are attained as conveniently can be. Provided, that if any of my said children shall happen to die under the age of twenty-one years without leaving any lawful issue then living, then the legacy or share of him or her so dying and all accruing shares of legacies under the provision shall go and belong to the survivors or survivor who shall attain the age of twenty-one years or die leaving issue then living, and be payable together and with his or their original legacies or shares. And I authorize and empower my said trustees and executors, with the consent of my said wife during her widowhood, to levy and raise by such ways and means as to them shall seem meet, out of my real and personal estate, and to advance and lend to any of my said children such part of their expectant portions as they my said trustees and executors shall think right, taking satisfactory security for the payment of the interest of the money so advanced during my said wife's life; the sum nevertheless so raised and advanced to be taken as part of the legacy of the child or children for whom the same shall be raised, and accounted for accordingly. And in case my said children by my first marriage, or any or either of them, shall refuse

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or decline to bring into hotchpot the personal property which they have derived from their said grandfather and uncle, then I declare my mind to be that the children or child so refusing shall not be entitled to any benefit under this my will. And I declare that in case my said wife should marry again, all the power and authority, benefit and advantage, given to her by this my will shall thenceforth cease and determine, and in lieu and stead thereof it is my will and desire that she should receive the sum of £5 annually from each of my children during the then remainder of her life; and it is not my intention that any part of their legacies should be invested or withheld to secure the payment thereof, but that she should only have a remedy against them personally for the same. And I direct that all 457] my debts and funeral and testamentary *expenses shall be paid and satisfied as soon after my decease as conveniently can be."

Testator died on the 7th of August, 1833.

The will was proved on the 12th of October, 1833, by Elizabeth Robins, the widow, and William Cooke, power being reserved to Robins Cooke, the other executor, to prove. This he had not done.

On the 5th of December, 1835, Elizabeth Robins was admitted to certain copyholds to hold to her upon the trusts and according to the form and effect of the will.

On the 5th of July, 1876, Elizabeth Robins died.

On the 8th of September, 1876, William Cooke and Robins Cooke, the surviving executors, put up the freeholds and copyholds comprised in the will for sale by public auction, under conditions, one of which was as follows:—

" . . . The vendors shall, subject to these conditions, make and execute to the purchaser of each lot proper assurances thereof, such assurances to be prepared by and at the expense of the purchaser, but the vendors, being the surviving donees of a power of sale contained in the will of the said Aquila Robins, will enter into no other covenant than a covenant that they have not incumbered the property; and the concurrences of the parties beneficially interested in the property or purchase shall not be required."

At the sale, William James Simpson became the purchaser, and a contract for sale and purchase was made in the usual manner.

Upon the abstract being sent the purchaser's solicitors asked, "How is it proposed to make a good title to the property? The will evidently contemplates the exercise of

the power of sale in the lifetime of the widow, and is not given to the surviving trustees. On the death of the widow the real estate vests in the children in equal shares, and no good title can be made without their concurrence."

In answer, the vendors' solicitors said they felt no doubt as to the ability of the surviving donees of the power of sale to confer a good title on the purchaser.

Ultimately this summons was taken out on behalf of the vendors, in the matter of the contract, and of the Vendor and Purchaser *Act, 1874, submitting for the opinion [458 of the court, "whether William Cooke and Robins Cooke have, either expressly or by implication, a power of sale over the real estate of the testator, and whether they can make a valid assurance of both the freehold and copyhold property to the purchaser without the concurrence of any other person or persons, so as to vest such property in him in fee simple;" and another alternative question, which it is not necessary to state.

Kay, Q.C., and *Edward Wilkinson*, for the applicants, the vendors: The surviving trustees and executors have ample power, not only to sell but alone to convey this estate upon the wife's death.

One of the directions is that upon the wife's death the property is to be equally divided, she being appointed one of the trustees and executors to whom a power of sale is given. That shows that the power of sale was intended to survive to the surviving trustees and executors. Then follow powers of management, leasing, and mortgaging. Could not the surviving trustees, after the death of the wife, have mortgaged?

Afterwards come the words, "shall be held in trust for all my aforesaid children," showing the existence of a trust after the death of the wife.

It is not necessary that there should be an express devise in order to vest the legal estate in trustees, if there be a clear intention that the real and personal estate shall be held in trust: *Lewin on Trusts* ⁽¹⁾; *Jarman on Wills* ⁽²⁾; *Trent v. Hanning* ⁽³⁾; *Doe v. Gillard* ⁽⁴⁾; *In re Turner* ⁽⁵⁾; *Ex parte Mornington* ⁽⁶⁾; *In re Boyce* ⁽⁷⁾.

Supposing this to be a mere common law power, independent of the Statutes of Uses, such a power will survive, it is

⁽¹⁾ 6th ed., p. 189.

⁽²⁾ 3d ed., vol. ii, p. 271.

⁽³⁾ 1 B. & P. (N.R.), 116; 10 Ves., 495;
7 East, 97.

⁽⁴⁾ 5 B. & A., 785.

⁽⁵⁾ 2 D. F. & J., 527.

⁽⁶⁾ 4 D. M. & G., 537.

⁽⁷⁾ 12 W. R., 359.

said, so long as the plural number remains: Sugden on Powers ('). That condition is fulfilled here.

459] *In *Houell v. Barnes* (') it was held that where the executors took an authority only, the survivor could sell: *Brassey v. Chalmers* (').

"A power given by a will or by an act of Parliament—as in the instance of the Land Tax Redemption Acts—to sell an estate, is a common law authority; the estate passes by force of the will or act of Parliament, and the person who executes the power merely nominates the party to take the estate": Sugden on Powers (').

In the direction respecting management it will be observed there is a special proviso that the widow is to have the sole management during her widowhood, showing by inference a plain intention that upon her widowhood ceasing the power was to survive to the other trustees and executors.

B. B. Rogers, for the respondent, the purchaser: The surviving trustees and executors have no legal estate; they can convey no interest either at law or in equity.

1. The will contains, not a trust for sale, but merely a power to sell. That appears to be conceded by the other side.

2. That power of sale is restricted to the lifetime of the widow: first, by the express terms of the will; secondly, by the law, which will not allow a general power to be exercised after the estate has become indefeasibly vested in some person or persons.

3. Without disputing any of the authorities, and admitting that the legal estate may possibly have been vested in the trustees during the life of the widow—whether it was or was not being now immaterial—the legal estate remained in them only during the life of the widow, and has now wholly ceased. At the death of the wife the real and personal estate is not directed to be converted. The intention was that it should go to the children just as it stood. Only during the widow's life were she and the trustees to have powers of management. The words, "I authorize and empower" do not create a trust for conversion. Afterwards the testator says, "I direct and empower," words which seem more
460] nearly to create *a trust; but if so, it is a trust co-extensive only with the life of the wife.

[BACON, V.C.: Supposing the wife had died the day after the testator's death, and there had been infants?]

The power would have been at an end. The law will not

(1) 8th ed., p. 126.

(2) Cro. Car., 382.

(3) 4 D. M. & G., 528.

(4) 8th ed., p. 45.

permit a general power to be exercised when the estate has once vested in possession: *Lantsbery v. Collier* ⁽¹⁾; *Doncaster v. Doncaster* ⁽²⁾; *Wolley v. Jenkins* ⁽³⁾; *Taite v. Swinstead* ⁽⁴⁾; *In re Brown's Settlement* ⁽⁵⁾, in which Lord Justice James (then Vice-Chancellor) admitted the principle ⁽⁶⁾; Sugden on Powers ⁽⁷⁾. The rule is useful, inasmuch as these children may possibly have settled, or otherwise dealt with, their shares. There is no trust in the will for reinvestment, so that a sale effects an actual conversion.

That the law as to leaseholds is the same as that of freeholds in this respect appears from *Baker v. White* ⁽⁸⁾, where the Master of the Rolls refers to *Stephenson v. Mayor of Liverpool* ⁽⁹⁾.

As to the remaining points, it is clear that a power to sell given to three persons cannot be exercised by two of them. If to A. and B., it cannot be exercised by the survivor of A. and B. If the donees be also executors, the point is left somewhat in doubt: Sugden on Powers ⁽¹⁰⁾. In *Brassey v. Chalmers* ⁽¹¹⁾ the question was, whether the power was given to A. and B. *nominatim* or as executors. Lord Romilly, M.R., held that it was given to them *nominatim*, but the Lords Justices reversed that and held that it was given to them *quâ* executors, and that the survivor could, with the assent of trustees appointed by the court, make a good title: *Lane v. Debenham* ⁽¹²⁾; *Stroughill v. Anstey* ⁽¹³⁾.

The result is that Messrs. Cooke are strangers, and can convey no estate legal or equitable.

Kay, in reply.

*BACON, V.C.: Notwithstanding the learned arguments which I have heard on the subject of powers, and the great obscurity which has sometimes been occasioned by the language of testators, I come back to where we started from, namely, the words of the will, because upon them must depend the solution of the questions that have been argued, as in all the instances which have been referred to.

Let us consider the language of this will. A man who is a farmer, being possessed of property, and having two sets of children, one by a former, the other by an existing marriage, directs that the farm shall be carried on for the benefit of his wife and all his children. Then, bethinking himself

⁽¹⁾ 2 K. & J., 709.

⁽²⁾ 3 K. & J., 26, 38.

⁽³⁾ 23 Beav., 53.

⁽⁴⁾ 26 Beav., 525.

⁽⁵⁾ Law Rep., 10 Eq., 349.

⁽⁶⁾ Law Rep., 10 Eq., 353.

⁽⁷⁾ 8th ed., p. 850.

⁽⁸⁾ Law Rep., 20 Eq., 166, 176.

⁽⁹⁾ Law Rep., 10 Q. B., 81.

⁽¹⁰⁾ 8th ed., p. 126.

⁽¹¹⁾ 4 D. M. & G., 528.

⁽¹²⁾ 11 Hare, 188.

⁽¹³⁾ 1 D. M. & G., 635.

of some property which will come to his earlier set of children, he desires that their shares should be brought into hotchpot, so as to form one common fund. These are his intentions, and nothing more, and then he appoints three trustees and executors, of whom his wife is one. So that it cannot be said that the objects of the testator were not intrusted to the three persons who are named in the will. That the legal estate will pass without words of conveyance, if duties connected with the estate are imposed on the trustees, is not disputed, and is not capable of being disputed. The only question is, whether they can exercise the powers which have been intrusted to them without being clothed with the legal estate. That they must have the legal estate in order to execute those powers, is the argument of the applicants on this summons, which argument the respondents do not admit. The argument of the respondents comes to this—what was meant was that events might arise on the happening of which the trustees might feel it desirable to call into their counsel the assistance of the children. But, in my opinion, it is not to be gathered from that, that there was meant to be any practical division of authority.

The testator says, "I am desirous." [His Lordship read the passage, and continued :]

The argument which has been addressed to the court on behalf of the purchaser is, that upon the death of the widow a share of the legal estate in this property vested in each of the children. But the answer to that is, that the testator has expressed his desire that upon the widow's death all his 462] property, both real and *personal, should be fairly and equally divided amongst all his children. Then there is not merely a hotchpot clause ; but there follows that which necessarily becomes a direction for conversion. All must be turned into money in order that there may be that equal division of the "common fund" of which the testator speaks, amongst the children. The will goes on to say, "Now therefore for carrying such intention into effect I do hereby appoint my said wife and her two brothers trustees and executors." So far, in my opinion, there is no sort of doubt or question. I do not know how the duties of these trustees could be discharged except by an absolute conversion on the death of the wife. Accordingly the testator says, "I do hereby authorize and empower them to manage and conduct my affairs and business, and all matters relating to my real and personal estates . . . for the benefit of my family in such way and manner as they in their discretion shall think fit; and for that purpose I

authorize and empower them to sell and convert into money all or any part of my said real and personal estates." [His Lordship read to the end of the passage.] Then the trustees are to carry on the farm, but so as not to interfere with the widow's management during her widowhood, and subject thereto the real and personal estates, "and the proceeds thereof" are to be held in trust for all the children "in equal shares and proportions."

The fact that there is a legal estate in the trustees not being in dispute, can I doubt that the testator has given the whole of his estate to the trustees named, in order that, amongst other things, they may sell, as well as mortgage, the real estate? Many contingencies might happen, in the event of which it might be convenient or necessary to raise money. If such a course had become desirable, would it have been a breach of trust on the part of these trustees to raise money? Although there is no direct gift to the trustees, I am of opinion that an absolute interest is by the terms of the will conferred upon them and vested in them for the purposes of the will, and, when those purposes are fulfilled, for effecting a division of the property as a common fund amongst the children.

The cases which have been referred to merely go to this, that when all the trusts of an instrument have been exhausted and *satisfied, and trustees are no longer [463 necessary, then their powers are to cease. Can that be said in this case? Is not the necessity for the interference of trustees as great and patent now as it was on the day when the testator died?

The case as presented to the court abstains from making any statement as to the particulars of the testator's family, and what will be the probable state of that family when the trustees come to discharge their ultimate duty. But I do not desire to speculate on that. The only question now is, are they at liberty to resort to a sale, as being the only mode in which they can "fairly and equally divide the property amongst the children"?

I think the trustees can make a good title under the conditions under which they have sold; and that the purchaser is perfectly safe in taking a conveyance from them alone. It cannot be said that the purchaser has been taken by surprise. He received a plain intimation that he was not to meddle with the execution of the trusts in exercise of which the trustees undertook to sell and convey to him. The case has been learnedly argued; and after all that has been addressed to me my opinion is that these trustees have not only

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the power to sell, but also to convey this property without resorting to the necessity of making the beneficiaries parties to the conveyance.

Feeling, as I do, for the reasons I have endeavored to state, no doubt about the construction, I must order the respondent to pay the costs of the summons.

Solicitors: *Richard Dickson*, agent for Wilkinson & Slann, Holt, Norfolk; *Norris, Allens & Carter*, agents for E. P. Simpson, Norwich.

Where an insolvent debtor assigns his property to several assignees for the benefit of his creditors, none of the assignees who accept the assignment in writing can voluntarily disclaim. An assignee can only be discharged by an order of court.

The assignees take as joint tenants, and all must unite in conveying.

If an assignment is made to and accepted by several, and one fails to give bond, and refuses to act, without being discharged, neither those who have given bond on their own behalf, nor they together with the non-acting assignee, nor the assignors, nor all together, can convey good title to real assets.

The title having been vested in all the assignees by the acceptance of the assignment, the bond on behalf of all is essential to enable any of them to convert the assets to the purpose of the trust: *Brennan v. Wilson*, 71 N. Y., 502, 4 Abb. N. C., 279, Court Appeals, and cases cited in notes.

Where the testator by his will appointed three executors, authorizing them to sell real estate, and invest the proceeds upon mortgage, or in the purchase of real estate, and all the persons named as executors, except one, renounced and never qualified: Held, that under the statutes of New York, the one who did qualify took all the powers conferred upon the three nominated in the will, in the capacity of

trustees as well as executors: *Leggett v. Hunter*, 19 N. Y., 445.

See 2 Perry on Trusts, §§ 497-505; and see Index, title "Survivorship;" *Williams v. Conrad*, 30 Barb., 525, 532, and cases cited; *Scranton v. Farmers, etc.*, 33 Barb., 527, 24 N. Y., 424; *Cotton v. Taylor*, 42 Barb., 578, 581, and cases cited; *Roome v. Phillips*, 27 N. Y., 357; *Dominick v. Michael*, 4 Sandf., 374; *Lyster v. Kirkpatrick*, 26 U. C. Q. B., 217; *Lyster v. Ramage*, 26 U. C. Q. B., 233; *Mitchell v. Ritchie*, 11 Grant, 511, 12 id., 88; *Ewart v. Snyder*, 13 Grant's (U.C.) Chy., 55; *Ewart v. Dryden*, 13 id., 50; *Jeroms v. Jeroms*, 18 Barb., 24; *Saunders v. Schemilzle*, 49 Cal., 59; *McMurtrie v. Penn.*, etc., 9 Philadelphia Rep., 529; *De Haven v. Williams*, 80 Penn. St. R., 480; *Bogert v. Hulett*, 4 Hill, 492; *Clark v. Henthall*, 47 Miss., 434; *Parker v. Sears*, 117 Mass., 513; *Osman v. Traphagen*, 23 Mich., 80; *Evans v. Chew*, 71 Penn. St. R., 47; *Bailey v. Brown*, 9 R. I., 79.

So where, by the terms of a will, three executors are appointed, who are vested with the title of the whole property, real and personal, upon trust, and are qualified; on the resignation of one of the executors and his proper discharge from his office, the remaining executors are vested with the entire estate: *Matter of Crossman*, 20 How. Pr., 350; *Matter of Bull*, 45 Barb., 334, 337, and cases cited.

[4 Chancery Division, 464.]

V.C.B., Nov. 24, 1876.

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[1876 B. 192.]

Vendor and Purchaser—Limited Interest—Specific Performance with Abatement.

By marriage settlement real estate was limited to such uses as A. and B. (husband and wife) should appoint, and in default of appointment to the use of trustees during the life of B., in trust for her separate use, with remainder to A. in fee. A. entered into a contract to sell the property to C., who had notice of the provisions of the settlement; and in the contract it was stated that A. would "procure a proper assurance of the premises to the purchaser to be executed by all necessary parties." The purchase-money was paid by C. to the trustees of the settlement, and by them invested pursuant to the contract; and a draft conveyance in the form of a joint appointment by A. and B. to C. was approved, but before executing it A. died suddenly. B. having after A.'s death refused to convey her life interest:

Held, that C. was entitled to specific performance to the extent of A.'s reversion in fee, with compensation in respect of B.'s life interest, and a lien on the invested purchase-money in the hands of the trustees of the settlement.

THIS case, which was heard on demurrer in this court on the 17th of June, 1876, and in the Court of Appeal, as reported (¹), now came on for hearing.

The facts, which were not in dispute, were as follows:—

By the settlement, dated the 25th of August, 1866, made upon the marriage of William Sandys Cox and the defendant Isabella Cox, two houses in Paradise Street, Birmingham, were granted to William Hatton and Osborne Reynolds and their heirs, to such uses, upon such trusts, and in such manner in all respects as W. S. Cox and the plaintiff, by any deed or deeds, should at any time or from time to time appoint; and in default of and until such appointment to the use of Hatton and Reynolds during the life of Mrs. Cox, upon trust to pay the rents and profits thereof to her for her sole and separate use without power of anticipation, with remainder to the use of William S. Cox, his heirs and assigns forever.

In September, 1875, the plaintiff Barker entered into negotiations with the testator for the purchase of the two houses in Paradise Street, and the price agreed upon was the sum which, *invested in consols, would produce an in- [465 come of £180 per annum (£6,000 consols).

A contract of purchase was entered into between the plaintiff and the testator on the 25th of October, 1875, in which it was stated (par. 4) that the premises "are now settled to such uses as the vendor and Isabella Cox shall jointly ap-

(¹) 3 Ch. D., 359.

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point, and the vendor will procure a proper assurance to be executed by all proper parties."

An abstract of the vendor's title, including the marriage settlement, was sent to the plaintiff's solicitor; and pending the completion of the purchase, some correspondence took place between Mr. Cox, the testator, and his solicitor, and other persons, as to a proposed settlement of the purchase-money so as to secure, in the event of his decease, Mrs. Cox's life interest therein; but the testator was at this time very ill and unable fully to attend to business, and a proposed trust deed, though prepared, was never executed by the testator during his lifetime.

The title was accepted by the plaintiff Barker, and a draft conveyance was settled and approved on behalf of both parties.

On the 22d of December, 1875, £6,000 consols were purchased by Barker in the names of Hatton and Osborne Reynolds, the trustees of the marriage settlement, pursuant to the agreement for sale, and a deposit which had been previously paid by Barker was thereupon returned to him.

On the 23d of December, 1875, on which day the conveyance was sent by the purchaser's solicitor for execution by Mr. and Mrs. Cox, Mr. Cox died suddenly without having executed it.

By his will, dated the 3d of February, 1875, Mr. Cox had bequeathed the residue of his personal estate (after giving certain legacies thereout) in trust to invest and pay the income of such investments to his wife during her life for her sole and separate use, with gifts in favor of charities after her death.

By the same will, after reciting the provisions of his marriage settlement, the testator devised and bequeathed all his real estate to trustees upon trust, during the life of his wife, to pay her the annual income to arise therefrom during her life for her sole and separate use, with trusts for sale after her death, and for the application of the proceeds.

466] *Actions had been commenced, 1, by Barker the purchaser, claiming specific performance of the contract by a conveyance of the fee simple, subject to Mrs. Cox's life interest, with compensation out of the testator's personal estate in respect of such life interest; 2, by Mrs. Cox, who being advised that she was not bound to concur in the conveyance, by her statement of claim asked the determination by the court of the questions arising out of the contract as between herself and Barker the purchaser, and also as between

the real and personal representatives of the testator and herself.

To the statement of claim in Barker's action two demurrers were filed, 1, by the real representatives of the testator; 2, by Mrs. Cox and the personal representatives.

To Mrs. Cox's statement of claim Barker, the purchaser, demurred.

The demurrers were heard on the 17th of June, 1876, when the Vice-Chancellor overruled the demurrers in *Cox v. Barker*, and directed the demurrers in *Barker v. Cox* (which raised the question whether the purchaser was entitled to specific performance with an abatement or compensation, or merely to such partial performance as was claimed by him without any abatement) to stand till the hearing.

The decision of the Vice-Chancellor was affirmed by the Court of Appeal (').

The actions now came on for trial.

Sir H. Jackson, Q.C., and *Chapman Barber*, for the plaintiff, the purchaser: The contract being for a sale of the property in fee simple, the purchaser, who is willing to take as much as he can get, is entitled, according to the general rule, to specific performance to that extent, with compensation, by an abatement of the purchase-money, for that portion (Mrs. Cox's life interest) which he cannot get; Sugden's Vendors and Purchasers ('); *Mortlock v. Buller* ('); *Hill v. Buckley* ('); *Nelthorpe v. Holgate* ('); *Graham v. Oliver* (').

*The vendor's want of title to the entire interest will [467 not be available as a defence if the purchaser is willing to take such estate as the vendor can convey—in this case the fee simple subject to Mrs. Cox's life interest—and the vendor must submit to an abatement of the price to be paid for the entire fee simple contracted to be sold, but not capable of being conveyed: *Wilson v. Williams* (') (recognized as an authority both in Sugden's Vendors and Purchasers (') and Dart's Vendors and Purchasers (')); *Barnes v. Wood* ('); *Hooper v. Smart* ('); Dart's Vendors and Purchasers ('). The only exceptions to this general rule are, first, where the court, looking to all the circumstances, has seen that specific (or, more properly speaking, partial) performance would inflict a great preponderance of inconvenience and hardship,

(') 3 Ch. D., 359.

(') Page 305.

(') 10 Ves., 292, 316.

(') 17 Ves., 394, 401.

(') 1 Coll., 203.

(') 8 Beav., 124, 128.

(') 3 Jur. (N.S.), 810.

(') Page 305.

(') Page 1065.

(') Law Rep., 8 Eq., 424.

(') Law Rep., 18 Eq., 683.

(') Page 1067.

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Thomas v. Dering ⁽¹⁾; secondly, when the court is satisfied that the contract was to sell, not the fee, but only the chance or contingency of some one else conveying the fee: *Castle v. Wilkinson* ⁽²⁾. The cases in which, apart from the seexceptions, specific performance with an abatement has been refused, see *Wheatley v. Slade* ⁽³⁾; *Jones v. Evens* ⁽⁴⁾; *Maw v. Topham* ⁽⁵⁾, have not been approved by Lord St. Leonards, see Vendors and Purchasers ⁽⁶⁾, or depend upon their own special circumstances; and *Castle v. Wilkinson*, which may be relied upon by the defendants, was decided (against the purchaser) on the express ground that the vendor there did not profess to sell the fee, but only that estate which he was able to dispose of, and that the purchaser never could have believed for a moment that he could purchase the fee simple.

E. Russell Roberts, for the executors, submitted that the plaintiff, if he was willing to take the partial interest which could be conveyed to him, was entitled to have the agreement so far specifically performed, but was not entitled to any abatement or return of the purchase-money: *Maw v. Topham*. 468] **Kay*, Q.C. (*Woodroffe* with him), for the trustees of the will: In all the cases relied on by the plaintiff in support of his claim for specific performance with an abatement, there has been misrepresentation or misstatement of facts on the part of the vendor. Here the state of the title was disclosed by the contract, and the purchaser received distinct notice that the vendor was not owner in fee, and that he could only convey the property with the concurrence of his wife. The statement that her execution would be procured, is at most a misrepresentation of mere intention, and, as distinguished from a misrepresentation of existing facts, does not entitle the plaintiff to relief: *Jorden v. Money* ⁽⁷⁾. She cannot be compelled to convey: *Emery v. Wase* ⁽⁸⁾. And as the purchaser has not been in the slightest degree misled by anything appearing in the contract, but knew distinctly that he was contracting with husband and wife for the estate of the wife, and could only get what she was willing to convey, such a contract cannot be enforced either partially or wholly: *Castle v. Wilkinson* ⁽⁹⁾.

Rowden, and *A. T. Watson*, for other parties.

Rigby, for the Crown.

Sir H. Jackson, in reply.

⁽¹⁾ 1 Keen, 729.

⁽²⁾ Law Rep., 5 Ch., 534.

⁽³⁾ 4 Sim., 126.

⁽⁴⁾ 12 Jur., 664.

⁽⁵⁾ 19 Beav., 576.

⁽⁶⁾ Pages 309, 318.

⁽⁷⁾ 5 H. L. C., 185.

⁽⁸⁾ 5 Ves., 846.

⁽⁹⁾ Law Rep., 5 Ch., 534.

BACON, V.C.: Upon the main question in this case I cannot say that I entertain the slightest doubt. I think that I must treat this as if the vendor were now alive. Nothing that has happened since this contract can alter the relations subsisting between the parties when the contract was entered into. The cases are all consistent. I am not disposed to think that misrepresentation is a necessary element in those cases in which the court is called upon to do justice between the parties. The plain justice of this case does not require one word to be said about it. An owner in fee simple, subject to certain trusts in a marriage settlement which do not affect his interests unless they are put into execution, sells an estate, and sells it for a price which is fixed, the meaning of *which was clearly understood. [469 His wife was entitled to an estate for her separate use, and he did not mean to interfere with his wife's enjoyment of her life interest, and therefore a sum of money is to be set apart to produce an income equal to what she would receive from the rents, viz., £180 a year. Then comes the 4th clause of the contract [to which his Lordship referred]. She might die next day, and then the interest would be absolute. She might concur, and he expected she would concur. His engagement is that all necessary parties should concur; and he might safely enter into the engagement, for as there was a joint power of appointment, whether he could procure her concurrence or not, he knew that by withholding his own consent the incumbrance would never exist on the estate. What has happened is that he receives the purchase-money. The whole of it is paid to him. Every interest that he or any one succeeding to him could claim out of this estate is bought and satisfied; and the object of this suit is that those who represent him should be compelled to carry the contract into effect in its plain and material terms, or that they should forego that sum of money which has been paid, or make compensation. Cases have been referred to conveniently, but not, I think, necessarily, because the rule of the court is plain, that if a man enters into a contract to sell something, representing that he has the entire interest in it, or the means of conveying the entire interest, and receives the price of it and does not perform his contract, then the other party to the contract, who has parted with his money or is ready to pay his money, is entitled to be placed in the same position he would be in if the contract had been completed; or if not, by compensation to be placed in the same position in which he would be entitled to stand. I cannot doubt that the claim made in this suit is upon the whole a right claim.

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Specific performance is asked, but that cannot be decreed. Then it is asked that it should be declared that he is entitled to compensation. That seems a matter of course upon the facts admitted and urged in this case, and that he has a lien on the sum of stock in the meantime is, I think, equally clear.

MINUTE OF DECREE:—Declaration that as between the plaintiff, William Barker, and the real representatives of the testator, William Sandys Cox, the 470] *contract was binding; that the plaintiff was entitled to have the intended purchase completed by the trustees of the settlement as to the ultimate remainder only in the property, with compensation for the life interest of Mrs. Cox, the testator's widow; and that he was entitled to a lien on the stock standing in the names of the trustees.

Solicitors: *Gamlen & Son*, agents for W. Cottrell, Birmingham; *Kennedy, Hughes & Kennedy*, agents for Palmer & Broughton, Birmingham; *G. J. Brownlow*, agent for Watson & Baxter, Lutterworth; *Solicitors for the Treasury*.

The vendor of real estate has an equitable lien thereon for the purchase price: Moak's note to Clarke's Chancery (ed. 1869), 275, and cases cited; Bisham's Eq., §§ 353-6, 364; 2 Sto. Eq., §§ 1216-1230; Willard's Eq. (Potter's ed.), 301; Snell's Equity, 108-112; 1 White & Tudor's Lead. Cas. in Equity (4th Am. ed.), 462, *et seq.*

Alabama: Gordon v. Bell, 50 Ala., 213.

Arkansas: Johnson v. Nunnerly, 30 Ark., 153.

California: Gallagher v. Mars, 50 Cal., 23.

Canada, Upper: Paine v. Chapman, 7 Grant's Chy., 179; Grace v. Whitehead, Id., 591; McIntyre v. Shaw, 12 Grant, 295; McEdwards v. Ross, 6 Grant, 375; Sanderson v. Burdett, 16 Grant, 119, affirmed 18 id., 417; Conant v. Miall, 17 id., 574; Davis v. Bender, 4 id., 620.

Colorado: Francis v. Wells, 2 Col., 660.

District of Columbia: But must first recover a judgment at law and establish his debt if amount disputed: Ford v. Smith, 1 MacArthur, 592.

England: Coppin v. Coppin, Macnaghten's Select Cases, 91, marg. p.; Blackburn v. Gregson, 1 Cox's Chy., 91, and Hoffman's note; Whitlock v. Lysaght, 1 Sim. & Stu., 446, and Dunlop's note to Banks's ed.; Selby v. Selby, 4 Russ., 341, and Dunlop's note to Banks's ed.

Michigan: Clark v. Stilson, 36 Mich., 483.

Mississippi: If expressly reserved, is a matter of contract and a mortgage: Davis v. Hamilton, 50 Miss., 213; Moore v. Lackey, 53 Miss., 85.

New York: Garson v. Green, 1 Johns. Chy., 308; Hallock v. Smith, 3 Barb., 267; Dubois v. Hull, 43 Barb., 26; Clark v. Hall, 7 Paige, 382; Bradley v. Bosley, 1 Barb. Chy., 125; Burlingame v. Robbins, 21 Barb., 327; McClaskey v. McGinley, 7 N. Y. Leg. Obs., 288; Camp v. Gifford, 67 Barb., 434; Mears v. Kearney, 1 Abb. N. C., 303; Fisk v. Potter, 2 Keyes, 64; White v. Williams, 1 Paige, 502.

Tennessee: Lien reserved in deed: Chetwood v. Trimble, 58 Tenn. (2 Baxter), 78.

Texas: White v. Downs, 40 Tex., 225.

United States: Chilton v. Braiden, 2 Black., 458.

Wisconsin: Church v. Smith, 39 Wisc., 492.

Though in some of the states it is held that such lien does not exist without an express contract therefor.

Kansas: Smith v. Rowland, 13 Kans., 250; Simpson v. Munder, 3 Kans., 172; Brown v. Simpson, 4 Kans., 76.

Though if reserved by the conveyance, it is valid and equivalent to a mortgage: Smith v. Rowland, 13 Kans., 245.

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Massachusetts: Ahrende v. Odi-
orne, 118 Mass., 260.

Nebraska: Edminster v. Higgins, 6
Neb., 265.

The vendor of a leasehold interest in
real estate, has an implied lien to se-
cure the payment of the purchase-
money: Choate v. Tighe, 10 Heisk.
(Tenn.), 621.

Though the vendee have been di-
vested of title, if he, or another for his
benefit, become re-vested thereof, the
vendor's lien again attaches: Van
Wagner v. Findlay, 14 Grant's (U.C.)
Chy., 53; Ellis v. Singletary, 45
Tex., 27.

See Bernays v. Feild, 29 Ark., 218.

If A. owing B. allows B. to sell his
land in payment of the debt, the lien
attaches in favor of B., as he is the real
vendor: Perkins v. Gibson, 51 Miss.,
699.

If the vendor convey to the vendee's
wife, at request of the vendee, the lien
attaches to the land in the hands of
the wife: Doyle v. Orr, 51 Miss., 229.

Though it has been held in *Indiana*
that if a third person give his note for
the real estate, under an agreement
with the wife that he shall have a ven-
dor's lien, none attaches in his favor.
The case, however, seems to proceed
upon the theory that by taking the note
of a third person no lien attached in
favor of the vendor, and, consequently,
as an incident, none existed: Haskell
v. Scott, 56 Ind., 564.

See Marquat v. Marquat, 7 How. Pr.,
417, reversed on another point, 12 N. Y.,
336; Stucker v. Yoder, 33 Iowa, 177;
Durant v. Davis, 10 Heisk. (Tenn.), 522.

And so in *Illinois*, where the note of
the husband was taken on a convey-
ance to the wife: Andrus v. Coleman,
82 Ills., 26.

Where A., without authority from
B., purchases lands and takes title in
the name of B., no vendor's lien exists:
Weare v. Linnell, 29 Mich., 224.

A vendor has not, without express
contract, any lien thereon for indebted-
ness of the vendee from other transac-
tions: Refeld v. Ferrell, 30 Ark., 465.

Though by express agreement it may
be extended to other debts *if the vendor*
retain the title: Refeld v. Ferrell, 27
Ark., 534.

Whether the vendor's equitable lien
is assignable or not is also a question
upon which there is some conflict. In

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the following cases it was held that
such lien was assignable; in some that
it passes an incident to the debt, and in
some if the vendor assign the debt
which it secures and also assign the
lien *in terms*.

See Smith v. Smith, 9 Abb. Pr., N.S.,
420, and numerous cases cited.

Alabama: Edmonds v. Torrence, 48
Ala., 38.

Arkansas: Burnays v. Feild, 29
Ark., 218, distinguishing Williams v.
Christian, 23 Ark., 255.

But see Johnson v. Nunnerly, 30
Ark., 153.

Canada, Upper: Grace v. White-
head, 7 Grant's Chy., 591.

Colorado: Francis v. Wells, 2 Col.,
660.

Mississippi: Cummings v. Oglesby,
50 Miss., 153; Tanner v. Hicks, 12
Miss., 394; Moore v. Lackey, 53 Miss., 85.

New York: Smith v. Smith, 9 Abb.
Pr., N.S., 420; White v. Williams, 1
Paige, 502.

Tennessee: See Chetwood v. Trim-
ble, 58 Tenn. (2 Baxter), 78.

Texas: White v. Downs, 40 Tex.,
225; Ellis v. Singletary, 45 Tex., 27.

Wisconsin: Church v. Smith, 39
Wisc., 492.

And in the following that the lien
was not assignable:

Arkansas: Heckt v. Spears, 27
Ark., 229; Jones v. Doss, 27 Ark., 518.

Illinois: Markoe v. Andras, 67
Ills., 84; Wing v. Goodman, 75 Ills.,
159; Dayhuff v. Dayhuff, 81 Ills., 490.

See Wright v. Troutman, 81 Ills.,
374.

Otherwise if expressly reserved in
conveyance, for then is a matter of con-
tract: Markoe v. Andras, 67 Ills., 84;
Wright v. Troutman, 81 Ills., 374.

It has been held that if a part of the
notes given for the purchase price be
transferred by the vendor, the lien
passes to the transferee *pro tanto*:
Church v. Smith, 39 Wisc., 492; Ellis
v. Singletary, 45 Tex., 27.

See Rutland v. Brister, 53 Miss., 684.

One who takes title without a new
consideration from the vendee stands
in his shoes, and the vendor may still
enforce his equitable lien against the
lands.

Arkansas: Johnson v. Graves, 27
Ark., 557.

Canada, Upper: McEdwards v.
Ross, 6 Grant's Chy., 375.

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New York: Warren v. Fenn, 28 Barb., 333; Schieffelin v. Hawkins, 1 Daly, 289; Burlingame v. Robbins, 21 Barb., 327.

See Lamberton v. Van Voorhis, 15 Hun, 336.

A *bona fide* purchaser or mortgagee, for value, from the grantee, without notice of such equitable lien, will take his title divested thereof. If he paid only in part, or his mortgage be for only a portion of the value of the real estate, then only to the extent of such payment or mortgage.

Alabama: Gordon v. Bell, 50 Ala., 213.

And equity will marshal the liens of a mortgagee in favor of the equitable lien of the vendor: Gordon v. Bell, 50 Ala., 213.

Canada, Upper: Ferguson v. Kilty, 10 Grant's Chy., 152; Nichols v. McDonald, 6 Grant's Chy., 595.

Mississippi: Cummings v. Oglesby, 50 Miss., 153.

New York: Fisk v. Potter, 2 Keyes, 64.

Otherwise if he have notice of the non-payment, in fact, or from the nature and manner of the transfer to him.

Alabama: Edwards v. Torrence, 48 Ala., 38.

Canada, Upper: Davis v. Bender, 4 Grant's Chy., 620.

Colorado: Francis v. Wells, 2 Col., 660.

If the vendee have a contract for title only, and he be wholly in default, nothing passes to an assignee of the contract: Francis v. Wells, 2 Col., 660.

Illinois: Harshbarger v. Foreman, 81 Ills., 364; Blaisdell v. Smith, 1 Chicago L. J., 517; Thompson v. Scott, 1 Bradwell, 642.

New Jersey: Corlies v. Howland, 26 N. J. Eq., 311.

New York: Lamberton v. Van Voorhis, 15 Hun, 338.

One who seeks to defend against a bill to foreclose a vendor's lien, on the ground that he is a *bona fide* purchaser, must plead briefly the contents of his deed, and show, independent of its recitals, the consideration, and that it was *bona fide* paid; and should positively deny notice before payment and delivery of the deed, whether it is charged or not; and where notice is specially charged, should deny all circumstances referred to from which it could be in-

ferred: Pearce v. Foreman, 29 Ark., 563.

To charge a subsequent grantee with notice of the vendor's lien in favor of a remote vendor, the evidence must be satisfactory. Loose, vague and uncertain evidence will not be sufficient: Harshbarger v. Foreman, 81 Ills., 364.

The current of authority seems to be that one who purchases without notice of this equitable lien, on a sale on execution against the vendee, takes subject to the vendor's lien. The vendor not being a party to the judgment or sale is not estopped thereby. The judgment creditor obtains a lien upon the vendee's interest only, and cannot sell or transfer any other or greater interest than is created by his judgment, which is the basis of the sale.

Canada, Upper: See Strong v. Lewis, 1 Grant's Chy., 443; Van Wagner v. Findlay, 14 Grant's Chy., 53.

Michigan: Clark v. Stilson, 36 Mich., 483.

Mississippi: Davis v. Hamilton, 50 Miss., 218.

New Jersey: Corlies v. Howland, 26 N. J. Eq., 311.

New York: Patrick v. Arnold, 6 Paige, 310; Lamberton v. Van Voorhis, 15 Hun, 336.

As to whether the vendor's equitable lien is superior to the legal lien of a judgment creditor there is considerable conflict in the authorities. Such judgment liens are of two classes: First. Where the judgment, or the debt on which it was recovered, existed at the time of the grant. Second. Where, after the recording of the conveyance showing a valid legal title of record in the grantee, one has, subsequent to the title of record, given the grantee credit on the strength and faith of such legal title. In the first class the legal lien of the judgment creditor is subservient to the equitable lien of the grantor, for, as between the seller and an existing creditor of the purchaser, it is neither just nor equitable that an existing creditor should be allowed to sell property in satisfaction of his debt, which equitably, because of non-payment therefor, belongs to another.

Arkansas: See Doswell v. Adler, 28 Ark., 82.

Canada, Upper: It seems: Flint v. Smith, 8 Grant's (U.C.) Chy., 339; McIntyre v. Shaw, 12 Grant, 295.

Illinois: See *Milmine v. Burnham*, 76 Ills., 862.

New York: See *Dwight v. Newell*, 3 N. Y., 185; *Cook v. Kraft*, 41 How. Pr., 279; *Seymour v. Canandaigua*, etc., 25 Barb., 284; *Vail v. Foster*, 4 N. Y., 312; *Lamberton v. Van Voorhis*, 15 Hun, 836.

Virginia: *Cloud v. Renssaw*, 28 Gratt., 716.

Though, in some states, it is held that one who obtains a judgment against a vendee with title has a lien superior to that of the vendor for the purchase money.

Tennessee: *Fain v. Inman*, 6 Heisk., 5, and cases cited.

Texas: See *Ellis v. Singletary*, 45 Tex., 27.

In the *second* class, in the following cases, the lien of a judgment creditor was held paramount to the equitable lien of the vendor for the purchase price:

New York: *Hulett v. Whipple*, 58 Barb., 224.

See *Fisk v. Potter*, 2 Abb. Court App. Dec., 138.

And, in the following, that a judgment creditor's lien was subservient to the equitable lien of the vendor:

Mississippi: If expressly reserved by the conveyance: *Davis v. Hamilton*, 50 Miss., 213.

Where the vendor actually conveys the lands, a judgment against him will create no lien against his equitable lien for the purchase-money: *Shaw v. Ross*, 17 U. C. Q. B., 257.

And, it seems, a judgment recovered against one who has agreed to convey as against the purchaser, paying without notice of its recovery: *McQuestien v. Campbell*, 8 Grant's Chy., 242; 17 Grant, 615 note; *Floyd v. Harding*, 28 Gratt. (Va.), 401; *Hicks v. Riddick*, Id., 418; 17 Eng. R., 615 note; *Park v. Riley*, 3 U. C. Err. and App., 215.

The holder of a bond for title is regarded as the equitable owner of the land, and it may be sold or devised by him: *Irvine v. Muse*, 10 Heisk. (Tenn.), 477.

The lien ceases to exist whenever the acts of the vendor manifest that it is not relied on: *Smith v. Smith*, 9 Abb. Pr., N.S., 420; *Fisk v. Potter*, 2 Keyes, 64.

The obtaining of a judgment against the vendee for the amount of the un-

paid purchase-money, and a failure to collect the same, is not a waiver or extinguishment of the equitable lien for the purchase-money.

Canada, Upper: *Flint v. Smith*, 8 Grant's Chy., 339.

Michigan: In this state a judgment upon the indebtedness seems to be held to extinguish the lien: *Clark v. Stilson*, 36 Mich., 483.

New York: *Dubois v. Hull*, 43 Barb., 26.

Tennessee: *Chetwood v. Trimble*, 58 Tenn. (2 Baxter), 78.

Texas: *White v. Downs*, 40 Tex., 225.

The owner of land sold and conveyed it by a deed not recorded. Proceedings regular in form were taken in surrogate's court by the representative of the grantor in the deed to sell the same land for payment of the debts of the deceased grantor.

A *bona fide* purchaser, under such proceedings, who takes and records his deed, is entitled to hold the land as against a judgment creditor of the grantee in the unrecorded deed, who sells on his judgment and purchases the land: *Barto v. Tompkins*, etc., 15 Hun, 13.

In some cases it is held that the taking of a note, bond or other obligation for the debt, may show that the vendor did not rely on such lien and amounted to a waiver thereof.

Arkansas: *Lauder v. Abbott*, 30 Ark., 172.

Canada, Upper: *Boulton v. Gillispie*, 8 Grant's Chy., 223; *Rutherford v. Rutherford*, 11 Grant, 565; *Seney v. Porter*, 12 Grant, 546; *McDonald v. McDonald*, 16 Grant's Chy., 678; *Shannon v. Parsill*, 18 Grant, 8; *Helliwell v. Dickson*, 9 id., 414; *Colburn v. Thomas*, 4 Grant's Chy., 102.

Taking a mortgage held a waiver, and if not registered right, lost as against judgment creditor: *Burgess v. Howell*, 8 Grant's Chy., 37.

And see *Maulsom v. Moore*, 8 Grant's Chy., 448; *DeGear v. Smith*, 11 id., 570; *Seney v. Porter*, 12 Grant, 546; *Mathus v. Short*, 14 Grant's Chy., 254; *Helliwell v. Dickson*, 9 Grant, 414.

Illinois: *Kirkham v. Boston*, 67 Ills., 600; *Andrus v. Coleman*, 82 Illinois, 26.

Indiana: *Haskell v. Scott*, 56 Ind., 564.

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Kentucky: Gaines v. Casey, 10 Bush, 92; Ducker v. Gray, 3 J. J. Marshall, 163.

Mississippi: Rutland v. Brister, 53 Miss., 684.

New York: Vail v. Foster, 4 N. Y., 312; Hare v. Vandusen, 32 Barb., 92; Coit v. Fongeria, 36 Barb., 195; Camp v. Gifford, 67 Barb., 434; Gaylord v. Knapp, 15 Hun, 87.

See Hallock v. Smith, 8 Barb., 267; Dubois v. Hull, 43 Barb., 26; Warren v. Fenn, 28 Barb., 333; Garson v. Green, 1 Johns. Chy., 308; Bradley v. Bosley, 7 Paige, 125; McCluskey v. McGinley, 7 N. Y. Leg. Obs., 288; Mears v. Kearney, 1 Abb. N. C., 303; Fisk v. Potter, 2 Keyes, 64.

Tennessee: Irvine v. Muse, 10 Heisk., 477.

Texas: Ellis v. Singletary, 45 Texas, 27.

And in others not:

Alabama: Edmonds v. Torrence, 48 Ala., 38; Bozeman v. Ivey, 49 Ala., 75; Parker v. Abrams, 50 Ala., 34.

New Jersey: Corlies v. Howland, 26 N. J. Eq., 311.

Wisconsin: Church v. Smith, 39 Wisc., 492.

It has been held that this equitable lien is not an incumbrance within the clause of an insurance policy requiring the assured to state all incumbrances upon the property insured: Mason v. Agricultural Ins. Co., 16 Upper Can. Com. Pl., 493, affirmed 18 id., 19.

If the vendor retain title and the vendee sell his interest to a *bona fide* purchaser, the vendor becomes a trustee for such assignee and must convey to him, or if he convey to a *bona fide* purchaser for the purchase money which he has realized: Cummings v. Ogilby, 50 Miss., 153.

And this right attaches in favor of an infant heir, though the vendor convey to a third person at request of his mother: Forsyth v. Johnson, 14 Grant's (U.C.) Chy., 639.

So if one purchase lands with notice of an agreement on the part of his grantor to convey them, he will be compelled to fulfil such agreement: Champion v. Brown, 6 Johns. Chy., 403; Devine v. Griffin, 4 Grant's (U.C.) Chy., 603; Holcomb v. Nixon, 5 Grant's Chy., 278; Bryant v. Broze, 55 Geo., 438; Doolittle v. Cook, 75 Ills., 354.

In Osborne v. Osborne, 5 Grant's

(U.C.) Chy., 619, relief was refused on the ground that first purchaser was voluntary and without consideration.

In Longstaff v. Mansfield, 4 Grant's (U.C.) Chy., 607, it was held the purchaser was bound by acquiescence and laches.

If the vendor have retained title to the real estate, taking a note for the purchase price, if he desire to enforce the equitable lien he must tender a conveyance with his bill: Turner v. Lassiter, 27 Ark., 662; Thompson v. Smith, 63 N. Y., 301.

But see Freeson v. Bissell, 63 N. Y., 168.

As to right to maintain action where vendor has never parted with title, see Sternberger v. McGovern, 4 Daly, 456, modified 56 N. Y. R., 12, 15 Abb. Pr., N.S., 257.

A bill to enforce a vendor's equitable lien cannot be maintained against a bankrupt whose property has been assigned. The assignee should be the party defendant: Pearce v. Foreman, 29 Ark., 563.

In a suit to foreclose a vendor's lien, if the grantee be dead, his heirs and personal representatives are necessary parties, although as to the land itself the heirs are the real parties in interest: Allen v. Smith, 29 Ark., 74.

But see Bierne v. Brown, 10 West Va., 748.

In *Arkansas* it is held that the vendor's lien descends to the heir in the same condition as the ancestor held it: Lavender v. Abbott, 30 Ark., 172.

See 7 Eng. Rep., 736 note; 9 id., 743 note.

If a grantee from the original grantor be not a party to a suit to foreclose such a lien, a decree therein will be ineffectual to cut off his defence to the lien: Preston v. Breedlove, 45 Texas, 47.

In a bill to foreclose a vendor's lien the decree should direct, first a sale thereof, and then an execution for the deficiency. If the latter be first directed the judgment will be so corrected: McDonald v. Wright, 14 Grant's (U.C.) Chy., 287; Sanderson v. Burdett, 16 Grant, 119, affirmed 18 id., 417.

See Galt v. Erie, etc., 14 Grant's Chy., 499.

In a suit to foreclose a vendor's lien securing two notes, both owned by plaintiff, one of which is not due, it is erroneous to decree a sale subject to

a lien for the second note. The decree should simply direct the sale of enough of the land to pay the debt and costs, leaving the second note to its lien on the remaining portion of the land: *Garison v. Risque*, 9 Bush (Ky.), 24.

As to rights of husband and wife in the unpaid purchase-money, where the wife without consideration executed the conveyance to bar her dower, see *Nelson v. Holly*, 50 Ala., 8.

When the vendee makes advances or payments on the purchase-money, they will be held to be a lien upon the vendor's title or interest where the vendor refuses to or cannot perform.

Canada, Upper: *Kilborn v. Workman*, 9 Grant's Chy., 255.

Colorado: Provided the vendee do not altogether fail to perform: *Francis v. Wells*, 2 Col., 660.

England: *Rose v. Watson*, 10 H. L. Cas., 672.

New York: *Stevenson v. Spratt*, 85 N. Y. Superior Court Rep., 496.

South Carolina: *Adams v. Kibler*, 7 S. C., N.S., 47.

Though if the purchaser have been in possession he will be charged with the rents and profits, if the vendor acted in good faith: *Adams v. Kibler*, 7 S. C., N.S., 47.

Tennessee: *Wright v. Duffield*, 58 Tenn. (2 Baxter), 218.

No lien if vendee were guilty of fraud or imposition in procuring the deed the vendor seeks to rescind: *Wright v. Duffield*, 58 Tenn. (2 Baxter), 218.

Wisconsin: *McIndoe v. Morman*, 26 Wisc., 588.

Though the vendee must offer to rescind, when he will be allowed his payments and improvements, with interest, less the value of his use and occupation: *McIndoe v. Morman*, 26 Wisc., 588.

And so the vendee has an equitable lien for money expended or improvements made in compliance with a contract for the purchase of real estate, relying upon performance by the vendor: *Moak's note to Clarke's Chy.*, 350, marg. p. (ed. 1869); *Mumis v. Isle of Wight R. R., L. R.*, 5 Chy. App., 414; *Gilbert v. Peteler*, 38 Barb., 488, 38 N. Y., 165; *Savage v. Taylor*, Talbot's Rep., 234; *Kanawha v. Kanawha, etc.*, 7 Blatchf., 421; *Stevenson v. Spratt*, 87 N. Y. Superior Court Rep., 496.

Even though the contract be invalid within the statute of frauds, if the vendor refuse to perform: *McNamee v. Withers*, 37 Maryland, 172.

But see *Kilborn v. Workman*, 9 Grant's (U.C.) Chy., 255.

Otherwise if improvements made by the purchaser, when not in possession, under a valid contract for purchase: *Leslie v. Smith*, 32 Mich., 64.

The general rule is that, if there be no inequity in so doing, where the vendor cannot fully perform, the court may, at the election of the vendee, decree a specific performance with compensation in damages, or a proper reduction on account of the deficiency: *Gilbert v. Peteler*, 38 Barb., 488, 38 N. Y., 165; *Dalby v. Pullen*, 3 Simons, 33, Banks's ed.; *In re Eau Bank Drainage, Id.*, 449; *Beyer v. Marks*, 2 Sweeney, 715; *Burk's Appeal*, 75 Penn. St. R., 141; *Wilson v. Cox*, 50 Miss., 133; *Marlock v. Buller*, 10 Ves., 315; *Jackson v. Ligore*, 3 Leigh (Va.), 161; *Matthews v. Patterson*, 3 Miss., 729; *Canada, etc., v. Young*, 18 Grant's (U.C.) Chy., 566.

In some states it is held that if the wife of a party will not join in the conveyance, specific performance by the husband will be decreed, with compensation in damages for the refusal of the wife: *Park v. Johnson*, 4 Allen, 259; *Davis v. Parker*, 14 Allen, 94; *Zebbley v. Sears*, 38 Iowa, 507; *Union, etc., v. McAdam*, 38 Iowa, 668; *Marten v. Merritt*, 57 Ind., 34; *Kendrew v. Shewan*, 4 Grant's (U.C.) Chy., 578; *Van Norman v. Beaupre*, 5 Grant's (U.C.) Chy., 599.

In others, that a purchaser from a husband takes the risk of the wife joining in the deed, or his action against the husband for damages and specific performance will not be decreed against the husband, with an *abatement* on account of the wife's inchoate right of dower, if the wife's refusal be not in collusion with the husband. If the purchaser will pay the full purchase price, without the wife's conveyance, he is, however, entitled to that: *Burk's Appeal*, 75 Penn. St. R., 141; *Peeler v. Levy*, 26 N. J. Equity, 330; *Sternburgh v. McGovern*, 56 N. Y., 12; though in the latter case the court put its refusal to decree specific performance with abatement, upon the ground that to do so would work injustice.

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If, however, the wife's refusal to convey be made in bad faith, by the device of the husband, to escape his just obligation, a decree for specific performance, with indemnity for the wife's dower, will be made: *Peeler v. Levy*, 26 N. J. Eq., 330.

See *Gamble v. Gummerson*, 9 Grant's (U.C.) Chy., 193.

Though she cannot be compelled to release her dower: *Squier v. Harder*, 1 Paige, 494; *Peeler v. Levy*, 26 N. J. Eq., 330.

And see *Hawralty v. Warren*, 19 N. J. Eq., 124.

Where a husband and wife agreed to sell the *wife's* estate in fee simple, the purchaser being aware that the estate belonged to the wife, and she afterwards refused to convey, it was held that the purchaser could not compel the husband to convey his interest and accept an abated price: *Castle v. Wilkinson*, L. R., 5 Ch., 534.

Nor will the court decree specific performance of an agreement to procure for the plaintiff a good title to land owned by another to the plaintiff's knowledge: *Hill v. Fiske*, 38 Maine, 520.

[2 Chancery Division, 470.]

V.C.B., Dec. 14, 1876.

In re COMPAGNIE GÉNÉRALE DE BELLEGARDE.

CAMPBELL'S CASE.

Company—Power to borrow—Issue of Debentures at a Discount to a Director—Companies Act, 1862, s. 165.

Directors, with borrowing powers, issued debentures at $7\frac{1}{2}$ per cent. discount. Some of the debentures having been taken by a director:

Held, that the issue of debentures at a discount was not illegal; and that the director was not liable to the company for the difference between $92\frac{1}{2}$ per cent. and par.

ADJOURNED SUMMONS. Among the articles of association of the Compagnie Générale de Bellegarde, Limited, were the following:—

“16. The directors may from time to time borrow any sum or sums of money not exceeding the sum of £200,000, and, with the sanction of the company in general meeting, may borrow such further sum or sums of money, so that the whole debt for the time being of the company in respect of borrowed capital does not exceed in amount the nominal value of the capital for the time being of the company.

“17. The repayment of any money borrowed as aforesaid, and of the interest thereon, may be secured by mortgage of all or any part of the property and effects of the company, or by bonds, debentures, promissory notes, or in such other manner as the directors may think expedient.”

In the year 1872, the directors resolved to borrow £90,000 [471] by “mortgage obligations;” and a prospectus, of which a printed copy was exhibited by the official liquidator, but the issue of which was not regularly proved, and not admitted, contained these statements:—

"The company . . . are prepared to receive applications for 1,000 Mortgage Obligation Certificates of Series A, of the value of £20 (500 francs) each, and 700 Certificates of Series B, of the value of £100 (2,500 francs) each.

"The certificates will be issued at par, £5 per cent. being payable on application, £20 per cent. on allotment, and the remainder by three equal monthly instalments . . .

"The certificates will carry interest at the rate of £7 per cent. per annum." . . .

Finding that they were unable to place the debentures at par, the directors proceeded to issue bonds to the public at £92 10s. per cent. Of the bonds so issued, several of the directors took some; and, among others, a director named William Orr Campbell, took one set of bonds of the nominal value of £1,320, for which he paid £1,221, being at the rate of 92½ per cent., and also another set of the nominal value of £680, for which he paid £529, being at the same rate.

In the company's books an account was drawn out between the company and Mr. Campbell, in which he was credited with payment of the £1,320 in full, and debited with the sum of £99 under the entry "Commission on mortgage obligations," in respect of one purchase; and in respect of the other was credited with payment of the £680 in full, and debited with £51 on the other side of the account, under an entry in similar terms.

The company having been on the 15th of January, 1876, ordered to be wound up, the official liquidator now took out a summons that Mr. Campbell might be ordered to pay over to him these two sums of £99 and £51.

The official liquidator's affidavit in support stated the effect of the entries in the books to be, that Mr. Campbell "received or was allowed" the two sums of £99 and £51 "by way of commission or discount on the mortgage obligation certificates issued to him."

In answer, it was stated that "the bonds were all actually issued *at £92 10s. per cent. as an inducement to the [472 public to take them."

In reply, the official liquidator said it appeared from the books that bonds to the value of £100 were issued to Messrs. Stewart, and £240 to one Salisbury Ball, "without any such allowance being made."

It turned out that these were the only instances in which bonds had been issued on other terms than at 7½ discount.

The case was taken as representative of several others.

Sir H. Jackson, Q.C., and *Terrell*, for the official liquidator: A director is not allowed to make or retain any

commission out of the funds of a company: *Stringer's Case*⁽¹⁾; Companies Act, 1862, s. 165.

Without relying on the 154th section of the act, which makes the books *prima facie* evidence of the truth of all matters purporting to be therein recorded, we say that whether these sums be called discount or commission makes no difference, inasmuch as the books are evidence against the director.

The company, after having published the prospectus, had no power to issue debentures except at par. Even if they had power to issue debentures at a discount to the public, it was illegal to issue them at a discount to a director: *Imperial Mercantile Credit Association v. Coleman*⁽²⁾.

Assuming that the company is right in claiming these sums from Mr. Campbell, there is no set-off of these sums against any debt of the company to Mr. Campbell. These sums are moneys of the company in Mr. Campbell's hands. He is not a debtor in respect of them.

By the 98th section there is imposed upon the assets of the company, wherever they may be at the date of the winding-up, a trust to be applied in discharge of the liabilities of the company: per Lord Cairns, L.C., in *Delhi Bank Case*⁽³⁾; and see *Parlby's Case*⁽⁴⁾. In *Gloag's Case*⁽⁵⁾, Lord West-473] bury held that *the liquidator was entitled to sue at once for a sum advanced by the insurance company to one of the policy holders.

The 10th section of the Judicature Act, 1875, by importing into winding-up proceedings the rules in bankruptcy, for the first time admits into winding-up proceedings a mutual credit clause⁽⁶⁾. But a mutual credit and debt clause will not apply to a case like this, where, according to Lord Cairns and Lord Westbury, the money is not a debt, but assets of the company outstanding.

Kay, Q.C., and *W. Renshaw*, for Mr. Campbell: The articles empowered the directors to borrow in certain ways, "or in such other manner as the directors may think expedient;" and that directors may, by resolution properly carried, issue debentures at less than par, appears from *In re Anglo-Danubian Steam Navigation and Colliery Company*⁽⁷⁾ and *In re Regent's Canal Ironworks Company*⁽⁸⁾.

Why should all the world be at liberty to take these debentures, except the directors? The whole issue was taken

⁽¹⁾ Law Rep., 4 Ch., 475.

⁽²⁾ Law Rep., 6 H. L., 189.

⁽³⁾ Alb. Arb., 15 Sol. J., 923, 924.

⁽⁴⁾ Reilly's Alb. Arb. Cas., 48.

⁽⁵⁾ Eur. Arb. Cas., Law Times Rep.,

82; 17 Sol. J., 534.

⁽⁶⁾ Bankruptcy Act, 1869, s. 39.

⁽⁷⁾ Law Rep., 20 Eq., 339.

⁽⁸⁾ 3 Ch. D., 43.

up at 92½, except in the two instances referred to by the official liquidator:

Then as to the set-off. Putting it at the highest, Mr. Campbell is liable only for moneys had and received. But in this instance no money was received by Mr. Campbell. The books, no doubt, debit him with £99 and £51—that is, they credit him with £100 per cent., and debit him with 7½ per cent., but in truth he paid only 92½ per cent., like everybody else. That is a mere matter of book-keeping.

The *dicta* of judges in cases under statutory arbitration are not authorities. But taking the judgments as reported, all Lord Cairns and Lord Westbury meant was, that you cannot set off a debt payable at a future day against a debt presently payable.

Sir H. Jackson, in reply.

BACON, V.C.: This case, in one point of view, is of importance because it has been argued as if it fell within the principle which the courts *of equity have always [474 adhered to, not to permit an agent, or director, or any person in a fiduciary character, and having power and influence in the concern, to make a profit by his dealings with the concern.

But the fact that any profit was made I find to be wholly wanting in this case. There was no profit. The directors publish a prospectus, in which they say, "We are going to issue bonds at par." It is all very well to say so, but when they come to issue these bonds, people will not take them at par. What are they to do? They find they cannot place them at par, and they sell them on the best terms they can, and, except in the two particular cases mentioned, they issue all these debentures on the same terms as those on which the debentures taken by Mr. Campbell were issued. What is there unlawful in that? What is there to prevent the directors buying on the same terms as other people? The case, when examined, does not fall within the principle upon which the application is made. The section of the Companies Act which has been referred to is really wide of the present case. That section compels restitution from directors when they shall have misapplied or retained in their own hands, or become liable or accountable for, any moneys of the company. But, in this instance, when did the difference between par and 92½ per cent. ever become the money of the company? It was money which they never received, and which was never theirs. The section proceeds, "or has been guilty of any misfeasance or breach of trust in relation to the company." What misfeasance or breach of trust

was Mr. Campbell guilty of in advancing to the company, on exactly the same terms as everybody else, money which they were in want of? It was not money for which he had become liable or accountable. The company's books have been kept, as it appears to me, in the proper and regular way. It is necessary for book-keeping purposes that there should be entered on the credit side of the ledger the aggregate amount of all the debentures representing the debt due from the company. Then the company debit the amount unpaid, and whether that amount be called commission or discount, the true nature of the transaction cannot be obscured. The directors did that which it was lawful for them to do—they issued debentures at a certain discount. Mr. 475] Campbell took them *as other people took them, and paid his money for them. He derived no sort of profit from them; the advantage, if any, was all on the side of the company.

Something has been said about the conduct of the official liquidator. Mr. Campbell, in his affidavit, states this fact, which is uncontradicted, and not capable of being contradicted now that it appears that these debentures were issued on the same terms to everybody, except in the two instances mentioned, and then the official liquidator—not well advised, I think—says, “They were not issued on the same terms to all, for there are two instances in which they were issued on different terms.” There is nothing of any real weight in this, and the official liquidator was, I think, ill advised in bringing this forward to justify his original statement, that Mr. Campbell had derived a benefit from the transaction, which was inconsistent with his duty to the company as a director. In my opinion there is no ground whatever for the suggestion.

It is not necessary that I should say anything about the set-off; but I have no doubt that there is a set-off in this case. Sir Henry Jackson reminds me that by the section in the Judicature Act of 1875 to which he referred, the rules of bankruptcy for the time being are introduced into winding-up proceedings, and although the Companies Acts of 1862 and 1867 contain no section about mutual debts and credits, the mutual credits section of the Bankruptcy Act, 1869 (¹), is now, by the 10th section of the Judicature Act of 1875, made applicable in the winding-up of a company. But that consideration forms no ingredient in my judgment.

The summons must be dismissed with costs, to be paid by

(¹) Section 39.

the official liquidator; the official liquidator to have his costs out of the estate.

Solicitors: *Elmslie, Forsyth & Sedgwick; Lawrance, Plews & Baker.*

[4 Chancery Division, 483.]

V.C.H., Dec. 1, 2, 19, 20, 1876.

*PRICE V. JENKINS.

[483

[1875 P. 12.]

Marriage Settlement by Widower and Widow—Limitation in Favor of Widower's Son—Construction—Son a Volunteer—Agreement for Sale by Widower—Specific Performance.

Under a marriage settlement the son by a former marriage of the intended husband took an interest in property brought into settlement by the husband :

Held, that the son was a volunteer, and that to the extent of his interest the settlement was void as against a subsequent purchaser from the husband.

Clarke v. Wright ⁽¹⁾ commented upon.

THIS action was by Margaret Price for specific performance of a contract dated the 16th of November, 1874, as follows:—

“I, Thomas Jenkins, of Pant, agree to sell that piece of land and the buildings on it between the Bruce Hotel and the road that leads to the B. & M. Ry. Station, measuring in Victoria Street about 48 feet frontage, and in the said new road about 36 feet more or less, to Mrs. Margaret Price, of the Bruce Hotel, for the sum of two hundred pounds, and to give her the lease of the same for the remaining period of 99 years, in full consideration of the same.

“Thos. Jenkins.

“I accept the agreement.

Margaret Price.”

In the first instance Thomas Jenkins was the only defendant, but it appeared that his son Thomas Jenkins the younger claimed, adversely to his father, an interest in the property, and he was accordingly, by the direction of the court, made a defendant.

Thomas Jenkins the younger was a son of the original defendant by his first marriage. The property the subject of the contract belonged to Thomas Jenkins the father for a term of years at the time of his second marriage, which took place in March, 1875, and was settled by him on that occasion upon trust for himself and his intended wife during their joint lives and for the survivor for life, and after the death of the survivor for his son, Thomas Jenkins, abso-

⁽¹⁾ 6 H. & N., 849.

lutely. The intended wife's property was settled as to part 484] *for her separate use, and as to the rest upon such trusts as she should appoint, and in default of appointment, for her for life for her separate use, and after her decease in trust for all and every her children then living or thereafter to be born who being a son should attain twenty one, or a daughter should attain that age or marry under it, equally as tenants in common.

Thomas Jenkins the father also raised a defence which, in the opinion of the court, was not established, that the contract was void by reason of his having been drunk when he signed it. He stated that the settlement on his son was consented to by his second wife, but was not made at her instance.

Dickinson, Q.C., and *Freeling*, for the plaintiff, after referring to the case of *Heap v. Tonge* (¹), and particularly to the judgment of Mr. Justice Williams in *Clarke v. Wright* (²), *Dart's Vendors and Purchasers* (³), and *Sugden's Vendors and Purchasers* (⁴), submitted that the sole consideration for the settlement was marriage, and that the son was a mere volunteer whose interest was overridden by the subsequent sale.

Morgan, Q.C., and *Maclean*, for the defendants: The limitation in the settlement in favor of the son was not voluntary. The bargain was cemented by the marriage, and the son cannot be considered as a mere volunteer. The observations in *Clarke v. Wright* apply to this case, which is, however, a much stronger one than that, as the child here is legitimate. The court cannot split the consideration for the settlement. *Newstead v. Searles* (⁵) governs this case, and it ought to be followed.

[They also referred to *Hewison v. Negus* (⁶); *Nelthorpe v. Holgate* (⁷); *Ford v. Stuart* (⁸); *Clayton v. Earl of Winton* (⁹); *Jthell v. Beane* (¹⁰); *Pulvertoft v. Pulvertoft* (¹¹).]

HALL, V.C., after commenting upon the evidence on be- 485] half of *Thomas Jenkins the elder that he was drunk at the time when the contract was entered into, and the argument that the contract was, on that ground, not one that could be enforced by the plaintiff, and stating that the evidence showed that he was not drunk, and that it was clear that he entered into the contract unconditionally, and

(¹) 9 Hare, 90, 104.

(²) 6 H. & N., 849.

(³) 5th ed., vol. ii, ch. 15, s. 5, p. 976;
ch. 18, ss. 9, 10, pp. 1114, 1115.

(⁴) 13th ed., pp. 716, 717.

(⁵) 1 Atk., 265.

(⁶) 16 Beav., 594.

(⁷) 1 Coll., 203.

(⁸) 15 Beav., 493.

(⁹) 3 Madd., 302, n.

(¹⁰) 1 Ves. Sen., 215.

(¹¹) 18 Ves., 84.

referring to an agreement by counsel that the question on the settlement should be now decided, continued:

It is unnecessary to determine whether, in the absence of such agreement, this is a contract of which the court would decree specific performance, leaving it an open question, to be determined hereafter in a litigation between the son and the purchaser, whether or not the settlement was effectual as against the latter; but the parties having agreed to have the question of the validity of the settlement, as against the purchaser, disposed of in this litigation, in my opinion the plaintiff would have been entitled to such a decree. It was argued that the court would not decree that to be done which involved a sanction or a recognition of that which was a fraud or attempted fraud upon the persons interested under the settlement. But such contention would not, I think, be available. Thomas Jenkins the elder having contracted to sell the residue of the whole term in the leasehold property, it was not open to him to say afterwards that he had not got it and would not give it to the purchaser, when she said she would take, and did not object to his title.

I now come to consider the validity of the settlement, as against the purchaser. The case of *Clarke v. Wright* ⁽¹⁾ has been relied upon by the defendant the son. That is a case which I should only follow in a similar one—I do not mean a case in which the settlement was of the same description of property, and the limitations and terms of it were framed in precisely the same way, but a case to which the principles, to be collected from the judgment in that case, and, as I consider, laid down by the Court of Exchequer Chamber, were properly applicable. But I must observe that it is very difficult to apply the principles of decision of that case to any other case not exactly similar in its circumstances; by reason of the grounds of the decision being different in the Court of *Exchequer, where the case was first de- [486 terminated by four judges, from those in the Court of Appeal, and the grounds of the decision in that court not only differing, but differing as regards the judges who agreed with the decision of the Court of Exchequer.

The authorities which have been referred to may, I think, for the present purpose, be considered as commencing with the case of *Newstead v. Searles*, as reported by Mr. West ⁽²⁾. I refer to that report because facts are there stated from Lord Hardwicke's own notes and the Registrar's book which are not to be found in Mr. Atkyns' report. The argument

⁽¹⁾ 6 H. & N., 849.

⁽²⁾ Pages 287, 292.

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of the Attorney-General for the plaintiffs, the children of a first marriage, was, to a great extent, founded on this—that they were the primary objects of the articles, and were to be preferred, or at least to take equally with, the children of the second marriage. Lord Hardwicke in his judgment referred to the position of a widow about to contract a second marriage, stating that unless the articles were binding it would become impossible for a widow on her second marriage to make any certain provision for issue of a former marriage, and the second husband might then contrive to defeat the provision made for those children. In the latter part of the judgment, after going through the case, he said: “Taking the case with all its circumstances, I think the settlement no voluntary agreement, but a binding one; the statute of the 13th and 14th of Elizabeth that makes conveyances fraudulent, are voluntary conveyances, made against purchasers for valuable consideration or *bona fide* creditors; but it would be difficult to show that such a limitation as the present case has been held fraudulent, and void against subsequent purchasers or creditors.” He then referred to the case of *Jenkins v. Keymis* ⁽¹⁾, stated in the note of the judgment in West’s report, and also in Atkyns, and said: “The present is a stronger case, for here are reciprocal considerations both on the part of the husband and the wife by the provision under the articles for the children of the second marriage.”

It may be useful to refer to *Jenkins v. Keymis*. It was a case of this kind: Sir Nicholas Keymis was tenant for life, and his son Charles was tenant in tail. Then, “in consideration of a *marriage to be had between his son and Blanch Mansell and £2,500 portion, he levied a fine to the use of Sir Nicholas Keymis for life, remainder to Charles and Blanch for their lives, remainder to the heirs of the body of Charles of Blanch begotten, remainder to the heirs of the body of Charles, with power to Sir Nicholas Keymis to charge the premises with £2,500.” So that Charles acquired by that settlement limitations in favor of his issue, not only of the intended marriage, but generally in favor of the issue of any marriage. The £2,500, which was to be the daughter-in-law’s fortune, was in consideration of a marriage to be had between Sir Nicholas’s son and Blanch; but it does not appear whether the portion was paid to the son, or whether it was paid to the son and the father, or to the father alone. I am not at all sure that it did not go to the father alone; but, at all events, the lady’s fortune of £2,500

(¹) 1 Lev., 150.

was paid on the occasion of the marriage. The son was party to the arrangement with the father, and that money being paid, there were limitations made in favor of the children of the son not confined to the issue of that particular marriage. Then a mortgage was made by Sir Nicholas and Charles; and the question was, whether or not that was valid, or whether it defeated the limitations to the issue of the second marriage. It was alleged that "the consideration of the marriage of Blanch and the £2,500 paid with her did not extend to the defendant, being issue by the second *venter*, and so the estate in remainder whereby he claimed was voluntary." That was the ground of the contention, but Lord Keeper Bridgman "declared that the consideration of £2,500 paid on the first marriage should extend to the issue by the second *venter*." It really amounted to this: that it does not appear how the money was paid, or to whom it was paid, but the money was paid, and that was the consideration for the settlement being made in that form, viz., in consideration of £2,500 coming from the lady, a settlement was made which included the children of the son by a second marriage. There was, therefore, a money consideration which could not be severed and separated. That consideration ran through the whole of the settlement and the whole of the limitations. Under those circumstances the case is one of that class in which we find a consideration paid for the particular settlement, and we cannot defeat *the settlement and say it applied only to the one set [488 of limitations down to and including merely the issue of that marriage, but it embraced the whole. It was a case of bargain between the father and son. The father had to concur in the re-settlement with his son; and the son, no doubt, may be taken to have stipulated with his father in concurring in re-settling the estate and barring the entail by the fine for a re-settlement embracing issue of any marriage. They probably changed, in some respects, the course of settlement which existed previously. It does not appear, however, what the exact ulterior limitations were; but, probably, they cut off some remainders. It was a matter of contract between father and son for that particular settlement, as well as a contract arising from, and supported by, the consideration of the portion coming from the wife. It is important to refer to that, because that case was the groundwork of Lord Hardwicke's decision in *Newstead v. Searles* (¹), who said that that was a stronger case because of the reciprocal considerations both on the part of the hus-

(¹) West's Rep., 287.

band and wife by the provision under the articles for the children of the second marriage. Those reciprocal considerations were these: that the particular property which was dealt with in that litigation was settled by one limitation in favor of the issue of the two marriages. That being so, it came within the class of cases in which limitations in favor of strangers are mixed up with limitations in favor of persons who are not strangers; so that they are all to take together, or in a certain order of limitation, and such taking necessitates the court holding to be valid the limitations in favor of those who are not within the consideration. The court in such cases holds the whole to be effectual in order that it may give effect to that which, being within the consideration, must have effect given to it.

The case of *Newstead v. Searles* is really no authority for the general proposition that a settlement made on the occasion of a second marriage in favor of issue of a former marriage is an exception to the ordinary rule that limitations in favor of strangers or persons not within the consideration of marriage are, under the statute of Elizabeth, defeated by alienation for valuable consideration.

489] **Clayton v. Earl of Winton* (¹), which is stated in a note in the first volume of Sugden's Vendors and Purchasers (²), was relied on. In that case it was necessary to support the limitations in favor of those not within the marriage consideration, in order that the limitations in favor of those who were within the marriage consideration might take effect.

The case of *Jthell v. Beane* (³), also before Lord Hardwicke, was cited by Mr. Maclean. In that case there are some observations of the Lord Chancellor which were said to have a general bearing upon the present case. He said at the close of his judgment: "This is different from the case of a bond by a father, for it is a contract between the husband and the second wife and her friends, and so far like *Osgood v. Strode* (⁴), it being provided in the agreement that the son by the former wife should come in for a share, which is a bargain and for valuable consideration, for had it not been for this provision the husband would not agree to let it go so far as £400." The view that was taken in that case was that it was a bargain. Then he said: "This often happens on the marriage of a widow who contracts on a second marriage to make a provision out of her own estate after her death and the death of her second husband, for

(¹) 3 Madd., 302, n.

(²) Page 716.

(³) 1 Ves. Sen., 215.

(⁴) 2 P. Wms., 245.

her children by a former ; which may be said to be voluntary, yet is reasonable, prudent, and natural, several of which have been supported in this court as provisions for the children by the first marriage for valuable consideration. If the husband in such cases dies in life of the wife, who dies indebted, the court would not suffer her creditors to come against the children of the first marriage, for whom she had made this provision, because it was voluntary." There the case supposed is that of a widow about to marry stipulating with her intended husband that, in favor of the children of her former marriage, some portion of her property should be settled in a particular way. If there were such a bargain, I can understand, and do not dispute that it must have effect given to it, the question in these cases being, was there a bargain, according to the true construction of the particular instrument, that the property should be settled? In that case the observations are only applicable to the property *of the wife herself, that she [490 stipulated that some portion of her property which would otherwise come under the control of the husband, and in which he might have an interest of his own or some portion of it, should be settled in a particular way. The observations have no application whatever to the case of the other party to the contract making a settlement of his own property, and it not being a settlement made of the property of the wife. That brings me to the case before the Court of Exchequer, and afterwards before the Court of Exchequer Chamber, of *Dickenson v. Wright* ⁽¹⁾, and *Clarke v. Wright* ⁽²⁾. In the Court of Exchequer the judgment was delivered by Baron Channell. The view he took of it was this: First, he referred to the recital, "that it was agreed upon the treaty of the marriage that the property should be settled as therein contained. It is not stated by whom ; on this agreement, it was proposed that the remainder should be limited to the plaintiff. It may have been that Doncaster, the intended husband, took a strong interest in the welfare of this child, who was then very young. It may have been that he believed in the existence of a moral obligation upon the part of his intended wife to provide for it, and that he insisted upon the provision as a condition of his marrying her. An honest and upright man, under such circumstances, might well have done so. For aught we know he may have refused to marry her at all unless this provision was made, and it seems impossible for us to say conclusively, as a matter of law, that this limitation could

⁽¹⁾ 5 H. & N., 401.⁽²⁾ 6 H. & N., 849.

not be involved in the consideration of the marriage: see *Kekewich v. Manning* ⁽¹⁾. A case of *Johnson v. Legard* ⁽²⁾ was much pressed upon us." Then he referred to that which is the common and ordinary case of a limitation in favor of third parties, and said: "On the other hand, in the case of *Clayton v. Earl of Winton* ⁽³⁾, a limitation in a marriage settlement to the children of a possible second marriage was held good under the same circumstances. It may be difficult to see how the children of another marriage, to take place after the death of the wife of the present intended marriage, are more within the consideration of marriage than the living brothers of the husband; *but
491] the truth is that, when courts of law or equity once depart from the plain and obvious construction of an act of Parliament, there is nothing to guide or direct them, and it is not surprising that inconsistencies are to be found in their decisions. We have not been referred to any authority bearing directly upon the matter in question, and we cannot say that, upon the evidence at the trial, we are bound absolutely and conclusively, and as mere matter of law, to decide that the limitation in question is void against the plaintiff. We would act upon any decided case, but we do not feel inclined to put a construction upon this statute which its words do not authorize, beyond what the courts of law and equity have already laid down."

In the earlier part of the judgment, Baron Channell referred to the case of *Newstead v. Searles* ⁽⁴⁾, and said that it was "a direct authority, that a settlement by a widow, about to marry, upon her children by a former marriage, is good against a subsequent mortgagee." He looked upon that as a clear authority in favor of the general proposition that that was an exception from the ordinary rule. Having referred to *Clayton v. Earl of Winton* ⁽³⁾, he seemed to have considered, having regard to those authorities, that there were such exceptions, and that this might be one; and he approved of the view that had been taken generally by the courts as to the application of the Statute of Elizabeth to purchasers taking with notice. He was influenced by, and determined the case upon the application of the cases of *Newstead v. Searles* and *Clayton v. Earl of Winton* to that particular case—also being greatly influenced by the moral consideration as to the propriety of providing for the children. When the case came before the Court of Exchequer Chamber there were very elaborate arguments and

⁽¹⁾ 1 D. M. & G., 176.

⁽²⁾ 3 Madd., 283.

⁽³⁾ 3 Madd., 302, n.

⁽⁴⁾ West's Rep., 287.

judgments. The Lord Chief Justice began by saying ⁽¹⁾, "I am of opinion that the decision of the Court of Exchequer in this case should be affirmed, but I am unable to concur in the reasons on which the decision of that court appears to have proceeded." Then he went through those reasons, and said that they would not do at all, but said, "Nevertheless I am of opinion that this limitation may be upheld." He referred to **Newstead v. Searles* ⁽²⁾ and [492 *Clayton v. Earl of Winton* ⁽³⁾], and said that the present case appeared to him to come directly within the principle of *Newstead v. Searles*. I have already said what I consider the principle of the decision in *Newstead v. Searles* to be; and for reasons which I have given, with the greatest respect for the Lord Chief Justice, I say that *Dickenson v. Wright* ⁽⁴⁾ does not appear to me to come directly within the decision in *Newstead v. Searles*. Mr. Justice Blackburn approved of and adopted a paragraph from Mr. Dart's work, which says ⁽⁵⁾, "If such a stipulation cannot be presumed or proved"—a stipulation on the part of one of the contracting parties that the other contracting party shall settle some of his own property in a particular way—"the limitations must, it is conceived, be considered voluntary, and void as against a subsequent *bona fide* purchaser." Subsequently he said, "Yet when, as in *Newstead v. Searles* and *Clayton v. Earl of Winton*, and, as I think, in the principal case, the limitations so interfere with those which would naturally be made in favor of the husband, wife, and issue as to indicate that the limitations must have been discussed, and made part of the marriage contract, part of the reciprocal considerations between the husband and wife, that presumption is rebutted and the limitations are not voluntary." I say that I adopt what is here said by Mr. Justice Blackburn; but it is, I consider, inapplicable to the case now before me. The question which arises upon the construction of the settlement is: is it, or is it not, to be collected from the settlement that the intended wife stipulated that the intended husband should settle some of his own property upon his child by a former wife? I think not. I think the bargain was that the property should in substance, so far as regards the issue of the intended marriage and the intended wife, not be brought into settlement at all, but be left to the intended husband to make a settlement upon his son, this being, as a

⁽¹⁾ 6 H. & N., 870.

⁽²⁾ West's Rep., 287.

⁽³⁾ 3 Madd., 302, n.

⁽⁴⁾ 5 H. & N., 401.

⁽⁵⁾ 6 H. & N., 885.

matter of convenience and economy, done by the same instrument as the settlement of the wife's property.

It was said that there was evidence to show that there was a contract made in favor of the child of the intended husband by the first wife. For that purpose reliance was 493] placed upon the *6th paragraph of the answer of Thomas Jenkins the elder. But that paragraph, giving full weight to it, so far from supporting the proposition contended for, that this is a settlement, the result of a contract made by the intended wife in favor of the child of the husband by his first wife, is entirely the other way. [His Lordship read paragraph 6.] According to that statement, the defendant said, "I stipulated with my intended wife that this property should be left to me in order to be settled upon my son; I was the party who was desiring and intending that to be done. She consented to my being able to do it; but it was no bargain on her part that any such settlement should be made. She claimed no interest in this property, but she left it out of settlement without making any requisition in respect of it, and left it to me, because I was anxious to make a settlement myself of that upon my son; I stipulated for that, and she consented; so that she merely gave her consent to that being done by me for which I stipulated, and it was not a settlement made by her, or through her, or at her instance in any way." I refer to that in aid of the conclusion that this is nothing more than an ordinary voluntary settlement by a father upon his son, and is therefore inoperative as against a purchaser for valuable consideration. There must be a declaration to the effect that the settlement is inoperative as against the contract, and as against the conveyance to be made to the purchaser. There must be the usual declaration that the purchaser is entitled to specific performance, and a decree for that purpose. The original defendant must pay the costs of the suit; and as regards the son, who has been made a party, there will be no order as to costs.

Solicitors: *Charles R. James*, agent for C. F. and G. James, Merthyr Tydvil; *Sharp & Ullithorne*, agents for Simons & Plews, Merthyr Tydvil.

[4 Chancery Division, 496.]

C.J.B., Dec. 4, 11, 1876.

**In re S. J. ESICK. Ex parte PHILLIPS. [496
Ex parte ALEXANDER.*

Reputed Ownership—Order and Disposition—Withdrawal of Consent of True Owner—Bill of Sale of Goods in two separate Houses—Possession of Goods in one House taken before Notice of Act of Bankruptcy.

A trader executed a bill of sale of his stock-in-trade in his shop and his furniture in his dwelling house to secure a debt. The shop and the dwelling house were situate in different streets in the same town. An agent of the bill of sale holder took possession of the stock-in-trade just before the debtor filed a liquidation petition, but he did not take possession of the furniture till after he had received notice of the filing of the petition:

Held, that the possession taken of the stock-in-trade operated as a withdrawal of the consent of the mortgagee to the furniture remaining in the debtor's order and disposition.

The day before the possession was taken the mortgagee had instructed his agent to go and take possession of the property.

Semble, that the giving of these instructions amounted to a withdrawal of the mortgagee's consent to the property remaining in the debtor's order and disposition.

THESE were two appeals from an order made by the judge of the Aberdare County Court.

S. J. Eslick was an upholsterer at Aberdare. He carried on his business at No 19 Dean Street, and he resided at No. 15 Seymour Street, Aberdare. On the 2d of March, 1876, he executed a bill of sale by way of mortgage in favor of Moses Phillips. In this deed Eslick was described as of 19 Dean Street, and of 15 Seymour Street, Aberdare. It contained a recital that Phillips had agreed to lend Eslick £300 upon having the repayment thereof, together with £63 for interest thereon, secured in manner thereafter expressed; and by the operative part, in consideration of the £300 so advanced, Eslick assigned to Phillips all and singular the furniture, fixtures, utensils, books, plate, linen, and other goods, chattels, and effects specified and referred to in the schedule thereafter written, and belonging to the mortgagor, then being in or about the dwelling house and premises of the mortgagor at No. 19 Dean Street, and also all other goods, chattels, *and effects whatsoever of the [497 mortgagor in or about the said premises not comprised in the said schedule, and also all or any goods, chattels, and effects whatsoever which at any time thereafter should be in or about the same or any other premises of the mortgagor, whether brought there in substitution for, renewal of, or in addition to the goods, chattels, and effects thereby assigned, or any of them, or otherwise howsoever: To hold the same

1876 In re S. J. Eslick. Ex parte Phillips. Ex parte Alexander. C J.B.

to the mortgagee absolutely, but subject as thereafter mentioned: Provided that, in case the mortgagor should pay to the mortgagee the sum of £363 by twelve consecutive monthly instalments of £30 5s. each, the first to be paid on the 2d of April, 1876 (and in default of payment of any one instalment, he should forthwith pay the whole amount remaining unpaid), until by means of such payments the said sum should have been fully satisfied, together with all costs, payments, charges, and expenses thereafter mentioned, then the deed should cease and become void. And it was provided that if the mortgagor should make default in payment of the sum thereby secured, or any part thereof, at the times and in the manner thereinbefore provided for payment thereof, or (whether such default should have been made or not) in case he should suffer the goods to be distrained for rent, rates, or taxes, or to be seized under any legal process, or should remove or suffer to be removed the goods, or any of them, from the premises without the previous consent in writing of the mortgagor, or should make any assignment for the benefit of creditors, or file a liquidation petition, or render himself liable to be made or become bankrupt, then it should be lawful for the mortgagee forthwith, and without any previous notice or demand, to take possession of the mortgaged property, and to sell it and repay himself. There was a further power given to the mortgagee at any time, whether default should have been made in payment of the before-mentioned sum or any part thereof or not, to seize the property and retain possession thereof.

The schedule comprised, first, the stock-in-trade in the mortgagor's business premises; and, secondly, the household furniture and effects at 15 Seymour Street, his dwelling house. The execution of the deed was attested by W. H. Bidgood, an auctioneer residing at Cardiff, where Phillips, 498] who was a money-lender, also resided. *The bill of sale was duly registered, and Bidgood made the statutory affidavit on the occasion of the registration.

The instalments which fell due in April, May, and June were paid by Eslick. On the 28th of June, 1876, Phillips, having heard that Eslick had been removing some of the property comprised in the bill of sale, instructed Bidgood to go over to Aberdare, and, if he found that this had been done, to seize the whole of the property and sell it forthwith. Bidgood left Cardiff by the first train the next morning, and arrived at Aberdare about 9.25 a.m. He then went to Eslick's shop at 19 Dean Street. Eslick was not there, but Bidgood went in and commenced taking an inventory of the

property. At ten o'clock the same morning Eslick filed a liquidation petition in the county court, but Bidgood had no notice of this until after he had entered upon 19 Dean Street. He afterwards put a man into possession, and later in the afternoon of the same day he put another man into possession of the property at 15 Seymour Street, but this was not done until after he had received notice of the filing of the petition. D. T. Alexander was subsequently appointed trustee under the petition. He applied to the court for an order declaring that the property comprised in the bill of sale was, at the commencement of the liquidation, in the order and disposition of the debtor with the consent of Phillips, and had therefore passed to the trustee, and also that the property in No. 15 Seymour Street was not comprised in the bill of sale at all. Both the debtor and his father (who was present when the bill of sale was executed) deposed that that part of the schedule which related to the property in No. 15 Seymour Street, was not there at the time of the execution, and the suggestion was made that it had been added after the execution without the knowledge of the debtor. Both Phillips and Bidgood, on the contrary, deposed that no alteration had been made in the schedule since the execution of the deed. The judge found as a fact that the alleged alteration had been made after the execution, and consequently that the Seymour Street property was not comprised in the deed. His honor also held that the goods in No. 19 Dean Street were not in the debtor's order and disposition at the commencement of the liquidation. He decided, therefore, that Phillips was entitled to the Dean Street property, and that the trustee was entitled to the *Seymour Street property. Phillips appealed [499 from that part of the order which related to the Seymour Street property, and the trustee appealed from that part which related to the Dean Street property.

Winslow, Q.C., and E. C. Willis, for Phillips: The words "at No. 19 Dean Street," in the operative part of the bill of sale are mere misdescription, and do not limit the generality of the other words, which are sufficient to include the Seymour Street property: *Doe v. Carpenter* ('). So that, independently of the schedule, the Seymour Street property was included. But on the evidence we contend that the judge was not justified in finding that the schedule had been altered after the execution of the deed. And as to the question of order and disposition, Phillips, by giving instructions to Bidgood on the 28th of June, withdrew his consent to any

(') 16 Q. B., 181.

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part of the property remaining in the order and disposition of the debtor. The evidence is clear that Bidgood took possession of the Dean Street property before he had any notice of the act of bankruptcy, and his taking possession of that was a virtual taking possession of the Seymour Street property also.

De Gex, Q.C., and *Finlay Knight*, for the trustee: The debtor and his father having both positively sworn that the schedule had been altered, it was the duty of the trustee to submit the question to the court. It is clear that possession of the Seymour Street property was not taken until long after Bidgood knew of the filing of the petition; that, therefore, was ineffectual. But, in truth, Phillips had no right to take possession of any of the property, as no default had been made in payment of any of the instalments of the debt. And, before Bidgood had notice of the filing of the petition, he, according to his own story, had done nothing but begin taking an inventory of the Dean Street property; he had made no demand for payment, and had done no act amounting to taking possession. The property in both the houses therefore remained in the debtor's order and disposition. As to the alleged alteration in the schedule, the debtor and his father are disinterested witnesses; Phillips and Bidgood 500] have both of them a *strong interest in the matter. *Doe v. Carpenter* ⁽¹⁾ was a case of a will, not a deed. *Ex parte Arnold* ⁽²⁾ shows that the giving the instructions to Bidgood did not amount to a withdrawal of Phillip's consent.

BACON, C.J., after stating the provisions of the bill of sale, continued:

Upon the construction of the deed itself I do not think it possible to doubt that it is an effectual assignment, by way of mortgage, of all the articles specified, all the chattels as well in Seymour Street as in Dean Street. But it is said that this instrument is impeached by the evidence, and this is perhaps the most important of the points which have been argued. The deed is proved by the attesting witness to have been when it was executed by the mortgagor in the state in which it now appears. The deed is produced in that form, and it is impeached by the debtor and his father, who say that the last paragraph in the schedule has been added since the deed was executed. Was it ever heard of in any court that a deed could be impeached by such evidence and upon such grounds? A deed, which on its face is open to no suspicion, and which is proved by the attest-

⁽¹⁾ 16 Q. B., 181.

⁽²⁾ 3 Ch. D., 70.

ing witness, is sought to be impeached by such a statement as that. I say that such evidence is not to be regarded. It does not, however, rest there, because the witnesses were cross-examined, and the learned judge, as I understand, was of opinion that there were some other circumstances which raised suspicion, for instance, that there is a difference in the color of the ink in the two parts of the schedule. I can see no such difference. I can see a difference in the ink with which the attesting witness's name is signed and the other ink; but that is explained, because he says that he did not attest it until he got to his house at night, and then he wrote his name at the bottom of it. That is the only difference that I can find in the color of the ink. Then it has been urged by Mr. De Gex that there is a line drawn under the first part of the schedule, from which the inference is that the contents originally ended where that line was drawn. I do not think that any such inference properly arises. The circumstance is a *trifling one in itself, [501 but it is exactly that which in the most common course of business would be likely to happen. The man who draws the schedule has two paragraphs to deal with—two different schedules, if you like to call them so. Having finished one he draws a line to separate it from that which follows. I think that the existence of that line does not give rise to the shadow of a suspicion. I am unable to concur with the learned judge in saying that the deed was not executed in the form in which it now appears, forming my judgment upon that kind of evidence by which deeds are ordinarily proved in courts of justice.

Then comes the question of order and disposition. In the argument on behalf of the trustee that phrase has been repeated very often, but those pertinent words of the statute, "with the consent of the true owner," have been always omitted. And what kind of consent is to be ascribed to the true owner here? The question of order and disposition with the consent of the true owner has been at all times in the administration of bankruptcy, and still is, a question for the jury, a question of fact, and you must prove the fact that the true owner consented equally with the fact, if you rely upon it, that the goods were in the order and disposition of the debtor. Can a revocation of the consent be by any human means established more distinctly than it is upon the evidence here? The mortgagee the night before the day on which the seizure is made authorizes his agent to go to the place, and, by virtue of the mortgage which he holds, then and there to take possession of the goods. That

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is his act, and that is the mission of his agent. The agent goes and he meets the debtor at the railway station. He goes to his house, he executes his mission; he does not literally lay hands on the goods, but he walks in and takes possession of them exactly as a sheriff's officer takes possession of goods when he is putting in force a writ of execution; that is, he takes possession and would not allow any one else to remove them. How could there be a more plain and perfect possession taken in the eye of the law or as a matter of fact than that which Bidgood took on that morning, and, as the evidence plainly proves, before the liquidation petition was filed. According to the practice of the 502] court it could not be filed before ten o'clock, *and possession was taken sufficiently long before ten o'clock. Then it is said that he did not take possession of the property in Seymour Street before the filing of the petition. He did take possession of what he then could. If he were busy in securing that which was at Dean Street, and had not time until three o'clock in the afternoon to go up to Seymour Street, that is, in my opinion, a sufficient taking of possession. If he went in by virtue of this deed, which comprehended Seymour Street as well as Dean Street, and took possession of Dean Street, and as soon as he could went on to Seymour Street, that, I think, was enough. But where is the consent of the mortgagee? Assuming that the property in Seymour Street was in the order and disposition of the debtor, it was not so with the consent of the true owner. He had done all that he could to assert his title. He has entirely negatived the notion that there was any consent on his part to the property remaining, after Bidgood arrived, in the order and disposition of the debtor. I do not know any authority, and I do not believe there is any, which says that taking possession of part of the property only, releases the rest. There was one case where execution was levied, and an attempt was made to say that it was a partial levy only, but in that case, although some of the goods were situated at a distance, it was decided that the execution was perfect. But, without any reference to that case, and simply on the facts before me, and on the well established law applicable to this question, I think that the attempt to impeach this bill of sale has wholly failed, that its true construction is beyond a doubt, and that it is proved that before the liquidation petition was filed the consent of the mortgagee was withdrawn, even if possession had not been taken of the property. I am of opinion, therefore, that the mortgagee is entitled to the proceeds of the goods both

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in Dean Street and in Seymour Street. The trustee must pay the mortgagee's costs of both the appeals, but I make no order as to the costs of the hearing in the county court.

Solicitors for mortgagee: *Bell, Brodrick & Grag*, agents for H. P. Linton, Aberdare.

Solicitors for trustee: *Hacon & Turner*, agents for D. Richards Aberdare.

[4 Chancery Division, 503.]

C.J.B., Nov. 20; Dec. 18, 1876.

**In re E. ESICK. Ex parte ALEXANDER.* [503

Bill of Sale—Registration—Fixtures—Bills of Sale Act, 1854 (17 & 18 Vict. c. 38), ss. 1, 7.

A lease of a piece of land was granted to a trader, he covenanting to build upon it a steam saw-mill, messuages, or dwelling houses, and at the end of the term to yield up to the lessor the land, buildings, and fixtures, except the steam saw-mill, machinery, fixtures, and things connected therewith, which it was agreed the lessee might remove. The lessee afterwards mortgaged the property, the mortgage deed assigning the land, together with the steam saw-mills and buildings thereon, and the steam engines, boilers, fixed and movable machinery, plant, implements, and utensils fixed to, placed upon, or used in or about the ground, hereditaments, saw-mills, and buildings, to hold the hereditaments, and such of the machinery, plant, &c., as were in the nature of landlord's fixtures, to the mortgagee for the residue of the term, and as to such of the machinery and premises as were in the nature of tenants' or trade fixtures to the mortgagee absolutely, subject to redemption.

The deed contained a power for the mortgagee, in default of payment of the mortgage money, to sell the premises, or any part or parts thereof, either together or in parcels. The deed was not registered under the Bills of Sale Act. The mortgagor filed a liquidation petition. The mortgage money remained due. The mortgagee had not taken possession of any of the property comprised in the deed:

Held, that the effect of the deed was to authorize the mortgagee to sever the trade fixtures from the premises, and to deal with them separately, and consequently that the deed, not having been registered under the Bills of Sale Act, was void *quâ* the trade fixtures as against the trustee in the liquidation.

THIS was an appeal from a decision of the judge of the Aberdare County Court.

By an indenture of lease dated the 13th of May, 1874, the Waynes Merthyr Steam Coal and Iron Works, Limited, demised to Elisha Eslick, a cabinet maker and timber merchant at Aberdare, his executors, administrators, and assigns, a piece of ground in Aberdare for the residue of a term of sixty-eight years from the 25th of March, 1856 (less the last three days of the term), at the yearly rent of £50. The lease contained a covenant by the lessee that he would at his own cost, on or before the 1st of January, 1875, build and completely finish on the demised premises a building *for the purposes of a steam saw-mill, or messuages, [504 or dwelling houses. And also would at all times during

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the demise, at his own cost, uphold, repair, maintain, paint, cleanse, and keep the said buildings, &c., and the fixtures and other conveniences which should belong thereto; and also would, at the end or other sooner determination of the demise, yield up to the lessors the said piece of ground, buildings, &c., and all fixtures and other things whatsoever which during the said term should be fixed to the freehold of the said premises, in good repair and condition in all respects, except the steam saw-mill, apparatus, machinery, fixtures, and things connected therewith, and which it was thereby agreed the lessee might remove, making good however all such damage as might be done to the premises in such removal.

By an indenture of mortgage dated the 22d of August, 1874, and made between Eslick of the one part, and Marcus Moxham, a timber merchant at Swansea, of the other part, after a recital of the lease of the 13th of May, 1874, it was witnessed that, in consideration of £1,300 lent to Eslick by Moxham, Eslick covenanted to repay the £1,300 with interest on the 1st of January, 1875; and Eslick assigned to Moxham all and singular the piece of ground, hereditaments, and premises comprised in the lease, "together with the steam saw-mills, offices, erections, and buildings which have been or may hereafter be erected, constructed, and built upon the said piece of ground, and the steam engines, boilers, fixed and movable machinery, plant, implements, and utensils now or hereafter fixed to or placed upon or used in or about the said ground, hereditaments, saw-mills, offices, and buildings: To have and to hold the said hereditaments and such of the said machinery, plant, utensils, and premises hereinbefore expressed to be hereby assigned as are in the nature of landlord's fixtures and cannot lawfully be removed by the lessee, unto the said M. Moxham, his executors, administrators, and assigns henceforth for all the residue now to come and unexpired of the said term of sixty-eight years less three days; and, as to the rest of the said machinery and premises as are in the nature of tenants' or trade fixtures and can lawfully be removed by the lessee thereof, unto the said M. Moxham, his executors, adminis-
505] trators, and *assigns, absolutely," subject to a proviso for reassignment on payment of the mortgage money and interest. The deed contained a power for the mortgagee, at any time after the 1st of January, 1875, without any further consent on the part of the mortgagor, "to sell the said premises hereinbefore expressed to be hereby assigned, or any part or parts thereof, either together or in

parcels." This deed was not registered under the Bills of Sale Act.

In July, 1876, Eslick filed a liquidation petition. His creditors resolved on a liquidation by arrangement, and D. T. Alexander was appointed trustee. A considerable sum remained due to Moxham upon his mortgage. He had not taken possession of any of the mortgaged property.

The trustee applied to the county court for an order that the steam engine, saw-mill, machinery, and other trade fixtures, and also the tools, implements, and utensils in and about the steam saw-mills comprised in the mortgage belonged to him and not to the mortgagee. The judge held that the mortgagee was entitled to the property in question, and refused the application with costs. The trustee appealed.

Moxham made an affidavit, in which he deposed that the premises included in the lease could well be separated for the carrying on of distinct businesses; that saw-mills were not a necessary adjunct to the business of a timber merchant, but might be let and occupied separately from the timber yard; and that the office, also, might be occupied separately, being a detached and separate building. He also said that the machinery could not be taken away from the buildings without injuring them.

Little, Q.C., and Romer, for the appellant: The mortgage ought to have been registered under the Bills of Sale Act, in order to give it validity against the trustee so far as it relates to the tenants' and trade fixtures: Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), ss. 1, 7. The principle of the decisions is that, if the fixtures are dealt with separately, so as to give the mortgagee power to remove them and sell them separately from the land and buildings to which they are attached, then the deed must be registered as a bill of sale: *Mather v. Fraser* ⁽¹⁾; *Waterfall v. Peni-* [506 *stone* ⁽²⁾; *Boyd v. Shorrocks* ⁽³⁾; *Begbie v. Fenwick* ⁽⁴⁾; *Hawtry v. Butlin* ⁽⁵⁾; *Ex parte Daglish* ⁽⁶⁾; *Ex parte Barclay* ⁽⁷⁾. In the present case it was clearly intended to give the mortgagee power to deal with the fixtures separately. Therefore *Ex parte Daglish* applies, and not *Ex parte Barclay*. The county court judge thought the House of Lords had taken a different view of the law in *Meux v. Jacobs* ⁽⁸⁾. But in that case there was no bankruptcy; the

⁽¹⁾ 2 K. & J., 536.

⁽²⁾ 6 E. & B., 876.

⁽³⁾ Law Rep., 5 Eq., 72.

⁽⁴⁾ Law Rep., 8 Ch., 1075 n.

⁽⁵⁾ Law Rep., 8 Q. B., 290.

⁽⁶⁾ Law Rep., 8 Ch., 1072.

⁽⁷⁾ Law Rep., 9 Ch., 576.

⁽⁸⁾ Law Rep., 7 H. L., 481.

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question was only one of priority between two incumbrancers.

De Gex, Q.C., and *Everitt*, for the mortgagee: The turning point of the decision in *Ex parte Daglish* was the language of the power of sale, which was very different from that contained in the deed now in question. Moreover, there the mortgage was made by underlease; here it is made by assignment. The fixtures were there treated as a distinct subject of mortgage, which is not the case here. *Waterfall v. Penistone* and *Mather v. Fraser* ⁽¹⁾ both show that the true criterion is whether the fixtures would have passed by the deed without being specially named. *Meux v. Jacobs*, too, is an authority to show that they would. The question is, does the contract authorize the mortgagee to sever the fixtures and sell them separately? In the present case the evidence shows that the property might be conveniently sold in separate lots, and therefore the language of the power of sale can be satisfied without implying an intention that the fixtures should be severed. *Ex parte Barclay* therefore applies, and not *Ex parte Daglish*. The severance must be one which is necessarily contemplated by the mortgage deed. The *habendum* in the present case could not properly have been in any other form, and the power of sale does not assist the argument. In *Williams v. Evans* ⁽²⁾ it was held that the tenant's fixtures were comprised in a deposit of a lease by way of equitable mortgage. There is no distinction in principle between a mortgage of freeholds and a mortgage of leaseholds.

507] *BACON, C.J.: The question is, whether this deed, so far as it relates to the trade fixtures, is within the Bills of Sale Act or not. If it is, as it has not been registered it is void as against the trustee in bankruptcy of the mortgagor. That is the question which I have to decide. Without referring to any of the earlier cases, in my opinion the decision in *Ex parte Daglish* ⁽³⁾ covers the present case. The case of *Ex parte Barclay* ⁽⁴⁾ was distinguished from that, Lord Justice James saying that the distinction was thin, but substantial. The distinction was this, that although in *Ex parte Barclay* the deed gave the mortgagee power to sell the mortgaged property, either together or in parcels, yet the court held that he had no power to sever the trade fixtures from the house and sell them separately. The fixtures passed to him merely as a part of the house by means of the underlease to him. If, however, there is an assignment of

(1) 2 K. & J., 536.

(2) 23 Beav., 239.

(3) Law Rep., 8 Ch., 1072.

(4) Law Rep., 9 Ch., 576.

fixtures as a separate property, the intention being that the mortgagee shall deal with them separately, then the Bills of Sale Act applies. The policy of the law is clear. The words of the assignment in the present case are sufficient to give the mortgagee the fixtures of every kind. Then the *habendum* is in two parts, and nothing can be more distinct and separate than the description of that which is included in the second part of the *habendum*, and which is to be held by the mortgagee absolutely. But in whatever terms the deed may be expressed, the intention of the parties governs the construction. Can there be a shadow of doubt that the mortgagor, being possessed of two kinds of property, that in which he had an absolute interest, and that which he had only the right to use for a term, intended to deal with those two things separately? The language of the power of sale makes the intention of the parties still more distinct. The assignment comprises all the property, but the *habendum* declares that the mortgagee shall hold the two classes of property with perfectly different rights. The cases, as well at common law as in the Court of Chancery, appear to have clearly decided that, to render such a separate assignment of trade fixtures valid as against the trustee in bankruptcy of the assignee, the deed must be registered *under [508 the Bills of Sale Act. The case of *Meux v. Jacobs* ⁽¹⁾ was a very singular one. The decision of the Master of the Rolls was founded, as the report shows, upon an entire misstatement of the facts. It afterwards was found that neither of the bills of sale had been registered, and in truth the Bills of Sale Act had no application, for there had been no bankruptcy of the mortgagor. The judgments of the House of Lords explained very clearly the distinction between those cases to which the Bills of Sale Act applies and those to which it does not, and all the previous decisions were reviewed. The decision of the Master of the Rolls was reversed on the ground that the facts of the case were different from those which had been stated to him. In the present case the judge of the county court appears to have thought that the House of Lords had in some way impugned the authority of the decision of the Court of Appeal in *Ex parte Daglish* ⁽²⁾. The decision, however, in *Meux v. Jacobs* was founded upon the case being one to which the Bills of Sale Act had no possible application; it had nothing to do with the question which was decided in *Ex parte Daglish*. The present case is, in my opinion, as clearly within the words of the act as it is within the policy of the law. It is governed by

⁽¹⁾ Law Rep., 7 H. L., 481.

⁽²⁾ Law Rep., 8 Ch., 1072.

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Ex parte Daglish, and not by *Ex parte Barclay*(¹). The order of the county court must be reversed, and it must be declared that the appellant is entitled to the property, and he must have his costs.

Solicitors for appellant: *Torr & Co.*, agents for Griffith & Corbett, Cardiff.

Solicitors for mortgagee: *Tamplin, Tayler & Joseph*, agents for Strick & Bellingham, Swansea.

(¹) Law Rep., 9 Ch., 576. .

See 13 Eng. Rep., 14 note; 18 Eng. Rep., 61 note; *O'Hamway, etc., v. Hawley*, 44 Iowa, 57, 24 Amer. Rep., 719, and note p. 726, citing *McRae v. Central Nat. Bank*, 66 N. Y., 489.

As to the legal character of rolling stock of railroads, see 4 Southern Law Rev., N.S., 198.

Where chairs were furnished to a theatre, of a pattern that had to be made with special reference to the size, shape, and plan of the auditorium of the theatre in which they were to be placed, and were screwed to the floor, as they could not stand alone: Held, that they formed a part of the building, and that a mechanic's lien could be filed and enforced against the building by one furnishing them: *Gross v. Jackson*, 6 Daly, 463.

A steam engine, machinery and fixtures attached to the soil by a lessee thereof for the purpose of hoisting coal from mines situated thereon, including all boxes and other necessary appliances connected therewith, become a part of the lessee's estate therein: *Dobschuetz v. Holliday*, 82 Ills., 371.

Although, by the terms of a lease, the lessee has the privilege of removing all machinery and fixtures placed upon the leased premises, yet an engine and fixtures attached to the soil are a part of the estate itself until severed, and a mechanic or material man, who, under a contract with the lessee, furnishes such engine and fixtures, and puts it up on the premises, is entitled to a mechanic's lien, against the estate of the lessee on account thereof: *Dobschuetz v. Holliday*, 82 Ills., 371.

A voluntary surrender by the lessee of the leased premises to his landlord, before the expiration of his lease, cannot affect a mechanic's lien upon the leasehold estate, which attached whilst

the lessee was the owner; and in such case, if the owner of the fee should neglect to discharge the lien, upon the consummation of a sale under the decree establishing it, he would be compelled to accept another tenant: *Dobschuetz v. Holliday*, 82 Ills., 372.

See *ante*, 478 note.

Otherwise if the estate of the lessee had been in fact *forfeited* and the facts warrant a declaration of forfeiture by the lessor. The landlord must establish affirmatively a forfeiture of the lease, and that he has performed the necessary acts to declare a forfeiture: *Dobschuetz v. Holliday*, 82 Ills., 374; *Cheney v. Bonnell*, 58 Ills., 268.

Where a lessee of land, whose estate only is sought to be subjected to a mechanic's lien, surrenders his estate to the owner of the fee, a decree establishing the lien may properly order that, in default of payment of the amount of the lien by the lessee or the owner to whom he has surrendered, the interest of all the parties therein be sold; such a decree would be construed as applying to the interest of the parties in the leasehold estate, including the improvements for which the lien is established: *Dobschuetz v. Holliday*, 82 Ills., 371.

Gas fixtures, as distinguished from gas fittings, such as chandeliers and brackets, are not fixtures, and do not pass on a sale of a house to the purchaser: *Jarechi v. Philharmonic Society*, 33 Leg. Int., 101, Supreme Court, Penn., not reported in regular reports; *Vaughan v. Haldeman*, 33 Penn. St. Rep., 522.

Machinery erected by a lessee to carry on his business is personal property during his term; it may be sold on execution against him, and the purchaser may remove it before the expi.

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ration of the term : *Heffner v. L. Lewis*, 73 Penn. St. R., 302.

Where a railway company, under a license from the owner of real estate, laid down ties and rails thereon, the ties and rails so laid down do not become fixtures : *Cayuga, etc., v. Niles*, 13 Hun, 170.

Trover for conversion will not lie against one who, without notice, has purchased real property, a part of which had been sold to the lessees of his vendor, as personalty, with a stipulation that title should not pass until it was paid for, but which had been *allowed* to be made a part of the realty. So held where one bought a mill without notice that the water wheels were subject to such an arrangement : *Knowlton v. Johnson*, 87 Mich., 47.

Otherwise where one purchases with notice of such an arrangement : *Crippen v. Morrison*, 13 Mich., 23.

A mortgage of a building covers an engine and boiler, a steam gauge, a water tank, a steam pump connected therewith, and the shafting therein, intended to permanently increase the value of the building for occupation ; but not machines which are incidental merely, to the particular business carried on in the building at the time, although some of them are attached to the building by nails or bolts : *McConnell v. Blood*, 123 Mass., 47 ; *State Bank v. Kercheval*, 65 Missouri, 682.

See, however, *Wells v. Maples*, 15 Hun, 90.

A mortgagee of real estate, whose debt is due, but who has not entered into possession, cannot maintain replevin for a specific chattel, which the mortgagor or his assigns has severed and removed from the realty, and which, before severance, was a fixture, or part of the realty, and subject to the mortgage : *Kircher v. Schalk*, 39 N. J. Law, 335.

A second mortgagee of realty may maintain an action on the case, against the mortgagor, or his assigns, for an injury to the security resulting from the removal of fixtures or other waste by the defendant.

In such action, the plaintiff need not prove actual knowledge of his mortgage on the part of the defendant ; constructive notice, by proper registration, is sufficient. Nor need he prove that the defendant acted fraudulently, or intended to injure him ; actual damage, necessarily resulting from the defendant's acts, is the legal basis of his suit. Nor is the insolvency of his debtor a material fact.

In such action the damages recoverable are to be measured by injury to the mortgage as a security ; and if it be doubtful whether the damages should not go to the first mortgagee, the court will exert its equitable powers to control the disposition of the fund so that no injustice may be done : *Jackson v. Turrell*, 39 N. J. Law, 329.

The legal title to land was in the defendant's wife, and the equitable interest in the plaintiffs, except a portion of a certain value to be assigned to her by a master : Held, that a barn erected on the premises in controversy, during the pendency of the suit, became a part of the realty, and, it not appearing that it was erected by the wife, was properly included in the appraisal by the master, of the premises set off to the plaintiffs : *Samson v. Alexander*, 67 Maine, 523.

The purchaser at a foreclosure sale becomes the owner of the crops then growing upon the premises, notwithstanding the purchaser at such sale held the legal title to the lands under a parol agreement to make certain advances and hold the land as security, where it is not claimed he was under any obligation to remove the incumbrance under which the foreclosure sale was made : *Scriven v. Moote*, 36 Mich., 64.

Where a landlord repts premises to be used for a particular purpose, if he knowingly allows, without objection, the tenant to expend a considerable sum of money in fitting up the property for a different use, he will be estopped from insisting they shall not be so used : *Malley v. Thalheimer*, 44 Conn., 41.

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[4 Chancery Division, 509.]

C.J.B., Dec. 18, 22, 1876.

509] **In re Fells. Ex parte Andrews.*

Bill of Sale—Act of Bankruptcy—Assignment of whole Property to secure Existing Debt—Concurrent Possession by Grantee and Trustee in Bankruptcy of Grantor—Forcible Removal of Property by Grantee—Contempt of Court—Business of Deceased Trader carried on by Executrix—Implied Trust of Assets for Benefit of Testator's Creditors.

The grantee of a bill of sale and the trustee in bankruptcy of the grantor were in concurrent possession of the property comprised in it. The grantee had taken possession first. The trustee impeached the validity of the bill of sale. Before the question of its validity had been decided, the grantee forcibly removed part of the property :

Held, that, notwithstanding the fact that the grantee had taken possession first, the removal was an unlawful act, and that the grantee must pay the trustee's costs of a motion (which had been refused in the county court) to compel the restoration into the joint possession of the property which had been removed.

The executrix of a trader, who was also his residuary legatee, continued after his death to carry on his business ostensibly as her own :

Held (reversing the decision of the county court), that the assets of the business in the hands of the executrix were not impressed with any trust in favor of the testator's creditors, and consequently that, on her second marriage, such of those assets as remained in specie, as well as the property into which the rest had been converted, passed to her second husband.

IN this case there were two appeals from two orders made by the judge of the Wandsworth County Court.

John Southgate was a dairyman and cow-keeper. He died in June, 1872, having by his will appointed his widow, Sarah Sophia Southgate, his executrix, and having bequeathed to her the residue of his estate. She proved his will, and she continued to carry on the business after his death, though she was not authorized by the will to do so. On the 6th of June, 1876, she married Frederick Fells, and after this marriage she still continued to carry on the business. On the 3d of August, 1876, Fells and his wife executed a bill of sale in favor of Robert Thilthorpe, who was brother-in-law to Mrs. Fells. The deed contained recitals to the effect that Mrs. Fells, previously to her marriage with Frederick Fells, was indebted to Thilthorpe in the sum of £300; that she, at the time of her marriage with Fells, was pos-
510] sessed of the household furniture, *cows, and effects mentioned in the schedule to the deed; and that Thilthorpe had applied to Fells and his wife for payment of the £300, which they were unable to pay. And, by the operative part of the deed, Fells and his wife assigned to Thilthorpe all and singular the household furniture, cows, horses, carts, vans, stock and implements of trade, and all other

the effects mentioned in the schedule, which comprised all the stock-in-trade and effects at the dairy, and also all the household furniture and effects in the dwelling house of Fells and his wife. The assignment was expressed to be an absolute one by way of sale, and Thilthorpe by the same deed released Fells and his wife from the £300. On the same day Thilthorpe took actual possession of the property comprised in the deed. On the 2d of August Fells had committed an act of bankruptcy by failing to comply with a debtor's summons which had been served upon him on the 25th of July. On the 3d of August the sheriff of Surrey also seized the whole of the property under two writs of *fi. fa.*, which had been issued by two judgment creditors in two actions against Fells and his wife jointly. On the 3d of August the creditor who had issued the debtor's summons presented a bankruptcy petition in the county court against Fells, under which, on the 10th of August, Joseph Andrews was appointed receiver. On the 22d of August Fells was adjudicated a bankrupt, and on the 22d of September Andrews was appointed trustee. Andrews took possession as receiver on the 10th of August of the property comprised in the bill of sale, and continued in possession on his appointment as trustee. The sheriff took out interpleader summonses, and ultimately an order was made by the county court restraining the sheriff from selling. On the 22d of September the sheriff withdrew. On the 7th of October Thilthorpe forcibly removed two of the cows from the dairy. The trustee applied to the county court for an order that Thilthorpe should restore these two cows, and afterwards for an order to set aside the bill of sale as a fraudulent preference and an act of bankruptcy.

Thilthorpe was examined, and he stated that part of the debt of £300 was contracted by John Southgate in his lifetime. Mrs. Fells was examined, and she stated that some of the creditors of her late husband, John Southgate (besides Thilthorpe), were still *unpaid, and that the cows of [51] which she became possessed as executrix of John Southgate had been sold by her, and other cows bought. Fells was examined, and stated that, in addition to the property comprised in the bill of sale, he had nothing except a horse and two carts, which he had used in the business of a dealer in hay, which he had carried on separately. On the 24th of October the judge dismissed with costs the trustee's application for the restoration of the two cows, upon the undertaking of Thilthorpe not to part with the two cows for a month from the date of the order. On the 7th of November

the judge made an order upon the other application, declaring that the bill of sale was fraudulent and void as against the trustee with regard to any surplus which might remain of the property comprised in it after payment or satisfaction of the just debts of John Southgate remaining unpaid. And it was ordered that Thilthorpe should feed, milk, and tend the cows, the subject-matter of the motion, until the further order of the court, he undertaking to keep an account of the proceeds of the sale of the milk, and not to sell the two cows removed by him, the trustee undertaking not to sell the property comprised in the bill of sale until the further order of the court.

From both these orders the trustee appealed.

Cookson, Q.C., and *Edward Thomas*, for the appellant: The forcible removal of the two cows out of the possession of the trustee was a contempt of court, *Ex parte Cochrane* ⁽¹⁾; and the trustee's application for their restoration ought to have been granted.

The bill of sale ought to have been declared void against the trustee without any qualification. There is nothing to show that there is any unsatisfied creditor of Southgate, except Thilthorpe, and, even if there were, the assets are not impressed with any trust.

De Gex, Q.C., and *R. Vaughan Williams*, for Thilthorpe: If trust property is sold, and the proceeds are invested in other property, that substituted property, if it can be identified, is subject to the trust. *Ex parte Thomas* ⁽²⁾ which might seem to be an authority against us, was the case of possession being taken of the business of an intestate by a wrongdoer. Here the possession of the widow was rightful, and the property is identified, and Thilthorpe, so far as he was a creditor of Southgate, is entitled to be paid out of his assets. His assets did not on the second marriage pass to the second husband: *Kitchen v. Ibbetson* ⁽³⁾. No question of order and disposition can arise, as the wife was the true owner. As to *Ex parte Cochrane* ⁽¹⁾, there the receiver was first in possession, and the mortgagee interfered with his possession. In the present case the grantee was in possession before the receiver, and it must be assumed, until the contrary was shown, that his possession was rightful. The judge was right in not making the summary order asked for, and in waiting till the question of the validity of the bill of sale had been decided, keeping things *in statu quo* by means of the undertaking of Thilthorpe not to part with the two cows.

⁽¹⁾ Law Rep., 20 Eq., 282. ⁽²⁾ 3 M. D. & D., 40. ⁽³⁾ Law Rep., 17 Eq., 46.

BACON, C.J.: The learned judge of the county court seems to have considered that a widow who carried on business as a sole trader from the year 1872, when her husband died, till her second marriage, in the year 1876, is to be considered a trustee for the purpose of selling as trust property the property of which her first husband died possessed, she having been his executrix. No case has been referred to, no authority, no principle can be mentioned, which justifies any such conclusion. She, with the full knowledge, as I must assume, of all the creditors of her first husband, continued to carry on the business. She converted his cows into money. What she did with the money does not in the least signify, because it does not come at all within the principle of those cases in which trust property converted into money and again invested in other property is still charged with the trust. Dealing in the ordinary course of a dairywoman's business, she sells the cows, she milks them, she sells the milk; but she carries on the business as the sole ostensible trader; no suggestion of any trust is made by any *one; no objection is taken by the [513] creditors, the *cestuis que trust*, if they are to be so called. In her order and disposition, practically, all this property is left until the month of June, 1876. In June the marriage takes place between her and the present bankrupt. Upon that marriage all that was hers became his, and the liability to pay all her debts fell upon him. If she had committed a *devastavit* of her late husband's estate the second husband was answerable for it, and it might have been enforced against him. Well, he became bankrupt. Then, after he had committed an act of bankruptcy, he made an assignment of this property, of which he became the owner in his marital right, to a creditor of his wife's late husband, who was a creditor of his own; he makes a bill of sale to that creditor, and that creditor admitted, upon his examination, that he knew perfectly well at that time that proceedings in bankruptcy were being taken against the second husband. A more plain fraudulent preference of Thilthorpe over the other creditors of the bankrupt cannot possibly be conceived. Neither upon the ground of the property being trust property, of which there is no evidence, nor upon the ground of the transaction being protected by the bankrupt law, can it be said that the bill of sale is not utterly and entirely void. The notion seems to have found favor with the learned judge that the creditors of the late husband had some prior right in the administering of the bankrupt's estate, and, therefore, though he set aside the bill of sale (it is impossible that he

could have done otherwise), yet he reserved out of the operation of his order so much of the property as was necessary to answer the unpaid debts of the late husband. There is not the slightest ground for making such an exception. The bill of sale, purporting to assign all that the husband and wife had is void, and, being void, the bankrupt's creditors are entitled to all that he had and all that his wife had. Therefore the bill of sale must be set aside, and the estate of the bankrupt administered without regard to that imaginary trust which has formed the foundation of the learned judge's order.

The other question stands on a somewhat different footing. The bill of sale holder is said to have taken possession on the morning of the 3d of August. The sheriff's officer afterwards came into possession, and they had concurrent possession. Then the receiver *was appointed and put into possession, and at a later period he was appointed trustee, and remained in possession. That was no less a concurrent possession, even if the bill of sale holder had any right to possession. But the question of the validity of the bill of sale was then standing for decision by a court having jurisdiction in bankruptcy, between the bill of sale holder and the trustee who claimed the property, and in this state of things the bill of sale holder takes upon himself to remove some of the goods. He broke the concurrent possession. He helped himself to two of the cows, and took them away. That, in my opinion, was a very unjustifiable act on his part. I think that, although no previous order had been made by the court, the trustee was perfectly right in coming to the court and saying, "Until this matter is decided, at least make the bill of sale holder bring back those two cows. Order him to bring them back and leave things as they were, and then pronounce your decision on the validity of the bill of sale." That is what the trustee asked by that motion, which the learned judge thought fit to refuse, making the trustee pay the costs of it. Why should that be? The trustee's complaint was this, "My possession, concurrent if you will, is disturbed by the act of the bill of sale holder. I ask you to restore things to the state in which they were, and in which they ought to be when you pronounce your decision." That was a perfectly proper application, and one upon which an order ought to have been made for the restoration of the possession—concurrent if you will—of the two cows which had been removed. That order ought then to have been made. But it is unnecessary now to do more than discharge the order which the learned judge has made

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so far as regards the payment of costs, and to direct that the present respondent shall pay the costs of that motion. And on the other motion an order must now be made that, the bill of sale being utterly void against the trustee, the property comprised in it must be delivered to him to be by him administered in the bankruptcy as part of the bankrupt's estate. The respondent must pay the costs of the two applications, both here and in the county court.

Solicitor for appellant: *G. Castle.*

Solicitor for respondent: *W. T. Boydell.*

See 19 Eng. Rep., 719 note; *ante*, p. 124 note.

Where a party takes a deed in his own name for another, and pays part of the price with such other person's money, and the balance with his own, this will create a resulting trust in favor of such

other to the extent of his money so used with interest. So he may maintain an action therefor against such trustee, in assumpsit under the common counts, if such trustee sell said lands and receive the purchase-money: *Mason v. Showalter*, 85 Ills., 133.

[4 Chancery Division, 515.]

C.J.B., Dec. 22, 1876.

**In re CLARK. Ex parte NEWLAND.* [515]

Composition—Enforcing Payment—Money placed in hands of Debtor's Solicitor—Trust on behalf of Creditors—Solicitor's Lien for Costs.

The creditors of a debtor who had filed a liquidation petition resolved to accept a composition, payable in two instalments, the second instalment being secured by the joint and several promissory note of two sureties. No trustee was appointed. The debtor's solicitor registered the resolution, and he, by means of money supplied to him by the debtor, paid the creditors the first instalment. A sum sufficient to provide for the payment of the second instalment was placed in the solicitor's hands, partly by the debtor, but mainly by one of the sureties. The debtor gave the surety a bill of sale as security for the amount which he advanced. The solicitor sent a circular to the creditors, stating that he should be prepared on a specified day to pay them the second instalment at his office. He after this paid some of the creditors, but most of them were left unpaid. One of the latter applied to the court for an order that the solicitor should pay him. The solicitor claimed a lien on the moneys in his hands for costs due to him by the debtor, who had absconded:

Held, that the solicitor had constituted himself a trustee of the money for the creditors, and that the court had jurisdiction to order him to pay the applicant his proportion of the second instalment, which he was accordingly ordered to pay, with the applicant's costs.

THIS was an appeal from a decision of the judge of the Luton County Court.

On the 28th of October, 1874, William Clark, a farmer, filed a liquidation petition. Mr. Richard Hall acted as his solicitor in the proceedings. The first meeting of the creditors was held on the 20th of November, when it was resolved to accept a composition of 5s. in the pound, payable in two

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instalments, viz., 2s. on the 21st of December, 1874, and 3s. on the 30th of September, 1875, and that the second instalment should be secured by the joint and several promissory note of George Elliott and Elizabeth Wilson. The resolution was duly confirmed at the second meeting, on the 3d of December, 1874. No trustee was appointed in the matter of the composition. The resolution was registered by Hall, and he, out of moneys supplied to him by Clark, paid the first instalment to the creditors who had proved their debts. 516] The second instalment was *not paid when it became due, but on the 8th of January, 1876, Hall sent the following circular letter to the creditors who had proved:—

“In the matter of the composition between William Clark
and his creditors.

“Sir,—I beg to inform you that on the 22d instant I shall be prepared to pay to you the sum of 3s. in the pound, being the second instalment of this composition. The amount will be payable at my office.

“I am, Sir, your obedient servant,

“(Signed) Richard Hall,

“Solicitor for the said William Clark.”

This circular was received by H. P. Newland, one of the creditors, who had proved a debt of £62 13s. 9d. He made repeated applications to Hall for payment of the 3s. in the pound on his debt, but was unable to obtain payment, and in September, 1876, he applied to the county court for an order upon Hall to pay him £9 8s. 3d., the amount due to him. In opposition to the application Hall made an affidavit, in which he said that in the matter of the composition he acted solely as solicitor for Clark; that on the 4th of September, 1875, Clark executed a bill of sale of his growing crops, furniture, stock, and other personal effects to George Elliott, to secure a debt of £1,600 then due from him to Elliott, and Elliott thereby covenanted with Clark that he would on the 25th of September, 1875, pay the sum of £286 4s., the amount of the joint promissory note of himself and Elizabeth Wilson, and the £286 4s. was charged in favor of Elliott upon the property comprised in the bill of sale. Hall went on to say, “On the 10th of November, 1875, I received, under or by virtue of the said assignment and charge, the sum of £236 4s., on account of the said W. Clark, to be placed by me to his credit, and which I accordingly did, having previously, in the month of October, received from the said H. P. Newland the sum of £50 on account of the said W. Clark.” Hall further stated that he sent the

circular letter to the creditors, fully expecting before the 22d of January, 1876, to see Clark and "obtain from him specific *orders for payment of any balance remaining [517 in my hands after payment of my costs." After he had sent the circular he had not seen Clark, and he believed that he had absconded. He said that Clark owed him a considerable sum for costs incurred in the matter of the composition and in other matters, and he claimed to be entitled to retain those costs out of the moneys in his hands. He admitted that he had paid the second instalment of the composition to some of the creditors, and that he had a balance of £184 7s. remaining in his hands, which, however, he said, "I consider I am not justified in parting with except under an order of the said W. Clark;" and he added that he claimed a lien upon the sum in his hands for the costs due to him by Clark.

The judge dismissed Newland's application with costs. Newland appealed.

Cooper Wyld, for the appellant: The solicitor has constituted himself a trustee on behalf of the creditors, and the court has jurisdiction to order him to pay the appellant his share of the second instalment. He is not entitled to any lien for his costs on this money, which was placed in his hands for a specific purpose.

[He was stopped by the court.]

De Gex, Q.C., and *Macrae Moir*, for the solicitor: The solicitor is not a trustee for the creditors. He has acted in the matter only as agent for the debtor. The debtor may be able to sue him, but the debtor is the only person liable to the creditors. The solicitor is entitled to a lien on the money for his costs: *Ex parte Calvert* ⁽¹⁾. He is not liable to pay the creditors out of his own pocket. If the composition is not paid the creditors are not without a remedy; their original debts revive, and they can sue the debtor.

BACON, C.J.: I think it is impossible to sustain this order, which, indeed, *compels the creditor to pay [518 the costs of an application which ought to have been granted. Nothing can be plainer than the facts of the case. The resolution of the creditors is clear and distinct; the composition is to be paid in two instalments, the second of which is to be secured by the promissory note of two sureties. This note was paid, so far as was necessary, by one of the sureties, and the money was placed in the hands of Hall, who was the author, manager, and conductor of the whole business. Then he writes to the creditors, and tells them that he will be ready to pay them the second instalment on a day

⁽¹⁾ 3 Ch. D., 317.

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which he names. And after that it is contended that he will have to pay the applicant out of his own pocket. If the money is in his pocket, still it is not his own money, but money belonging to other people. There is a clear trust of it, which he has himself acknowledged by his circular to the creditors. He refused to pay the appellant upon the flimsy excuse that he could not do so without instructions from Clark, and now that Clark has fled he claims to be entitled to keep the money to pay the costs which Clark owes him. There is no foundation for this claim. The order of the county court must be discharged, and instead of it an order must be made that Hall do pay the appellant the second instalment of the composition upon the debt which he has proved, and also pay the costs of this appeal, and of the hearing in the county court.

Solicitors for appellant: *Cordwell & Tasman*, agents for F. C. Scargill, Luton.

Solicitor for Hall: *G. Hancock*, agent for Shepherd & Ewen, Luton.

[4 Chancery Division, 524.]

C.J.B., Dec. 11, 1876.

524] **In re WAUGH. Ex parte DICKIN.*

Building Contract—License to Employer to seize Materials on Default or Bankruptcy of Contractor—Seizure between Filing of Liquidation Petition and Appointment of Trustee—Protected Transaction—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 11, 23, 94, 95, 125.

A builder contracted with a building club to erect some houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architect of the club, or become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements; provided that the contractor should have drawn money on account of his contract.

The contractor commenced the works and carried them on for some time, **525]** *receiving a considerable sum from the club. On the 30th of May he filed a liquidation petition. On the 2d of June the architect of the club gave notice to the contractor that, as he had neglected to proceed with the works, they should, on the expiration of two days, employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works, and on the expiration of this notice the club took possession of the materials, implements, and plant:

Held, that the club were entitled, as against the trustee in the liquidation, to retain what they had seized, the seizure being a protected transaction within sect. 94 of the Bankruptcy Act, 1869.

[4 Chancery Division, 533.]

C.J.B., Jan. 15, 1877.

**In re CAUGHEY. Ex parte CAUGHEY.* [533]

Undischarged Debtor—Second Liquidation Petition—Discharge granted on Payment of Specified Sum to Trustee as the Purchase-money of the Estate—Money claimed by Trustee under First Liquidation—Rights of Trustee under Second Liquidation—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15.

An undischarged debtor went into business again, and afterwards filed a second liquidation petition. His creditors, old and new, empowered the trustee to sell the debtor's estate to him for £475, upon payment of which sum he was to be entitled to his discharge. The money was paid, and was then claimed by the trustee under the first liquidation. The court decided in favor of that claim. The second trustee thereupon claimed the debtor's stock-in-trade and effects:

Held (reversing the decision of the County Court Judge), that the debtor, having paid the £475, was free from the claims of all his creditors, and was entitled to retain whatever property he had acquired.

[4 Chancery Division, 537.]

M.R., July 6, 11: C. A., Aug. 4; Nov. 8, 1876.

**LACEY V. HILL.* [537]

[1870 L. 94.]

LENEY V. HILL.

[1870 L. 93.]

Bankruptcy—Concealed Overdrawing by Partner—Proof on behalf of Joint against Separate Estate.

H., a banker, took into partnership K., a country gentleman unacquainted with banking, who was not bound to bring in any capital or to attend to the business. K. did not acquaint himself with the accounts, though he occasionally came to the bank. H. from time to time fraudulently drew large sums out of the bank, and employed them in losing speculations on the Stock Exchange, concealing the overdrawings by means of fictitious entries in the books of the bank. K. never drew out anything. On the death of H. the bank was found utterly insolvent, and K. was adjudicated bankrupt. A decree was made for the administration of the estate of H., under which the trustee in bankruptcy of K. claimed to prove for what was due from H. for moneys thus fraudulently drawn out:

Held, by the Court of Appeal (James, L.J., Mellish, L.J., and Baggallay, J.A.), affirming the decision of the Master of the Rolls, that he was entitled to prove:

Held, further, that the rule in *Clayton's Case* ⁽¹⁾ could not be applied to fraudulent overdrawings.

THIS was a summons by the trustee in bankruptcy of Messrs. Kerrison, the surviving partners of a firm of Harvey & Hudson, bankers at Norwich, claiming to prove against the separate estate of Sir Robert Harvey, deceased, a former partner in the firm, for £635,000, alleged to have been improperly taken by him out of the funds of the bank.

⁽¹⁾ 1 Mer., 585.

In June, 1860, Sir Robert Harvey (then Mr. Harvey) was carrying on the bank by himself, and proposed to Mr. Kerrison, sen., a country gentleman unacquainted with the business of banking, to join him in partnership. The partnership commenced on the 18th of June, 1860. The articles contained clauses against overdrawings and a provision for an annual stock taking. Mr. Kerrison was to receive one-fifth of the profits, or if that share in any year was less 538] *than £1,000 then £1,000, but was not bound to bring in any capital nor attend to the business of the firm. In practice he attended at the bank on Saturdays, but did not examine the accounts. A son of Mr. Kerrison joined the firm in 1867, but no change took place in the conduct of the business. During the continuance of the partnership Sir R. Harvey, who managed the business, regularly made out balance-sheets which showed a considerable profit.

On the 19th of July, 1870, Sir Robert Harvey committed suicide. The next day the bank stopped payment, and it was then discovered that Sir R. Harvey had lost enormous sums through speculations on the Stock Exchange, and that during the continuance of the partnership he had been in the habit of drawing out large sums from the bank, with some of which he debited his own private account in the books of the bank, but for the most part, when a sum of money was thus drawn out and paid to any person on Sir R. Harvey's private account, he opened a fictitious account in the books, treating the person who had received the money as a debtor to the firm for that amount, and carried on the account in due form, charging the imaginary debtor with interest, and crediting him with interest as having been paid. In other cases Sir R. Harvey received moneys due to the firm and applied them to his own use, but never made any entry in the books of their having been received, leaving the person who paid standing in the bank books as a debtor. He also on various occasions drew bills on different firms, forged acceptances to them, entered them in the books as having been discounted by the bank, and carried the proceeds to his own account, or to one of the fictitious accounts, and afterwards removed the bills from the bank, though they were left standing in the books as being assets of the bank. The result of these proceedings was, that the bank was utterly insolvent, and the Kerrisons, who had drawn out nothing, but had allowed their imaginary shares of profits to remain in the business, were adjudicated bankrupts.

In the same year, 1870, a decree was made at the suit of

creditors for the administration of Sir R. Harvey's estate. In 1873 the trustee under the Kerrisons' bankruptcy brought in a claim for £323,525 16s. 1d., and liberty was given to a person representing *a number of stockbrokers, who [539 were the principal separate creditors of Sir R. Harvey, to attend the proceedings. In December, 1874, the trustee obtained leave to bring in a further claim, and accordingly brought in one for £311,000, being the amount taken from the bank by means of the forged acceptances, making together with the former £635,525 16s. 1d.

The separate creditors had received a dividend of 6s. 8d. in the pound on their debts, a sum being reserved sufficient to pay a dividend at the same rate on the £323,525 if established. The state of the assets was such that if the two claims of the trustee were allowed at anything near their full amount, the separate creditors would never receive anything more. After an elaborate investigation of the accounts in chambers, the claims were adjourned into court.

The case came on for hearing before the Master of the Rolls on the 6th of July, 1876.

Southgate, Q.C., *Fry*, Q.C., and *Cozens-Hardy*, in support of the claims, referred to *Ex parte Smith* ⁽¹⁾, *Ex parte Harris* ⁽²⁾, *Ex parte Yonge* ⁽³⁾, and *Ex parte Lodge* ⁽⁴⁾.

They were stopped by the court.

Joseph Brown, Q.C., and *Romer*, for the plaintiffs: The trustee in bankruptcy of Messrs. Kerrison has no right of proof against Sir Robert Harvey's separate estate. All the capital of the bank was brought in by Sir R. Harvey; it follows that the amount which he overdrew from the bank is attributable to the amount of capital which he brought into the firm. Further, the course of conduct pursued by Sir R. Harvey must be taken to have been acquiesced in by Mr. Kerrison, sen. It appears that in two half years, in 1863 and 1864, he knew from the accounts that sums had been withdrawn from the partnership, although they were subsequently repaid. That knowledge on his part must be taken to amount to consent to other and larger withdrawals on the part of Sir R. Harvey, and to a waiver of the clause against overdrawing contained in the articles of partnership.

*Even if Mr. Kerrison and his son had no actual [540 knowledge of Sir R. Harvey's dealings with the partnership moneys, they had constructive notice. The father was aware of and sanctioned the appointment of Mr. Hill as bank manager when the partnership was formed; he also

⁽¹⁾ 1 Gly. & J., 74; 6 Madd., 2.

⁽²⁾ 2 V. & B., 210.

⁽³⁾ 3 V. & B., 81.

⁽⁴⁾ 1 Ves., 166.

knew of the appointment of Mr. Richardson, who was under Mr. Hill, and of the bill clerks. These persons knew, or might have known, of the overdrawings, and their knowledge must be imputed to Messrs. Kerrison: *Ex parte Ford*⁽¹⁾. The manager and clerks were agents of the firm, and notice to them was notice to all the partners.

Moreover, supposing Messrs. Kerrison cannot be fixed with knowledge or constructive notice, still they were guilty of such gross laches in not properly investigating the accounts as to disentitle the estate to any right of proof. The laches on their part was the cause of the stockbrokers continuing to give credit to Sir R. Harvey, which they would not have done if they had interfered; thus their loss might have been lessened.

We contend that further time ought to be allowed for the investigation of the accounts.

Merewether, for the defendant.

Benjamin, Q.C., *Davey*, Q.C., *B. B. Rogers*, and *Dundas Gardiner*, for the representative of the Stock Exchange creditors: The rule on which the claim is based, namely, that where one partner abstracts money from the joint estate the joint estate may prove against the separate estate of the partner for the amount abstracted, applies to those cases in which the separate estate is increased by the amount abstracted, so as to disturb the equities between the estates; but it does not apply to cases where, as here, the amount abstracted is squandered without increasing the separate debt: *Fordyce's Case*⁽²⁾; *Ex parte Grill*⁽³⁾. The case of *Ex parte Harris*⁽⁴⁾, properly understood, does not support the claim which is here made.

541] *JESSEL, M.R.: This case, apart from the magnitude of the amount claimed and from the painful circumstances connected with the great fraud committed by the deceased baronet Sir Robert Harvey, is one of a very ordinary description, not presenting to my mind any difficulties of law or of fact. I will state shortly the nature of the case.

In June, 1860, Sir Robert Harvey, being then Mr. Harvey, was carrying on business alone as a banker. It is at least doubtful whether he was solvent at that time, at any rate there is no doubt that the large capital which nominally stood to his credit was not real. However, being apparently the owner of considerable capital, he takes in (I am sorry to

⁽¹⁾ 1 Ch. D., 521.

⁽²⁾ Cooke's Bankruptcy Law, 8th ed., p. 531.

⁽³⁾ Cooke's Bankruptcy Law, 8th ed.,

⁽⁴⁾ 2 V. & B., 210.

say I use the words "takes in" in the sense of deception as well as in that of allowing to enter) Mr. Kerrison, a country gentleman of considerable property, who appears then to have had no knowledge of banking, and who was not to bring in any capital. On the 18th of June the partnership began between Mr. Harvey and Mr. Kerrison. The articles of partnership contained the usual clause against overdrawings, and one providing for annual stock takings, and it was agreed that Mr. Kerrison was not to be bound to attend to the business of the bank. He did, in fact, go every Saturday and take some part in the business of the bank, but he neither looked at the books nor made those inquiries which probably a man of business would have made, and which, I think, if made by a competent man of business, might have put a stop to these frightful frauds. He was entirely ignorant of the mode in which Sir Robert Harvey conducted, or rather misconducted, the business from 1860 till the time of his death in 1870.

Soon after the partnership Sir Robert Harvey began, or continued, speculations on the Stock Exchange, and lost very large sums of money, and the way in which he paid these sums was that of stealing the money from the bank. I adopt Lord Eldon's expression—"he took the money out of the bank coffers and paid it to the stockbrokers." He sometimes drew out the money by debiting his private account first with an advance; he sometimes drew out the money by entering a fictitious credit in the books, often entering as a borrower the name of the broker to whom he paid the money, often entering fictitious names; sometimes *he overdrew his private account and then forged [542 bills, often in the name of non-existing firms, and he covered the advances to his private account by crediting that account with the forged bills and putting the forged bills into the till of the firm. On other occasions he simply opened fictitious credits in the books, debiting these amounts to persons who had never borrowed money, but who in fact had been his creditors, and in this way he drew out sums to the extent of hundreds of thousands of pounds in the whole, running over seven or eight years. Of course the eventual result must have been foreseen. The crash came at last in 1870, and Sir R. Harvey withdrew himself from earthly justice, at all events, by committing suicide. Mr. Kerrison, who had never drawn a farthing out of the firm in any way, but who had shown his thorough confidence in Sir R. Harvey, not only by leaving his supposed profits there (the accounts showed profits, although it was not so, but he thought

there were), but by paying money into the firm, was utterly ruined and made a bankrupt.

The real question I have now to decide is one in which Mr. Kerrison is not at all interested, because his estate is insolvent. It is a question between what is called the joint estate—that is, the estate of the firm of Harvey & Kerrison—and the separate estate, that is, the estate of Sir R. Harvey. . . When I say between the two estates, of course that is nominal. The real question is between the creditors of the two estates, that is, the depositors of the bank on the one side, and the stockbrokers who conducted Sir R. Harvey's speculations on the other side. They are substantially the people who are contesting the question. It arises in this way: Sir R. Harvey being dead, his estate is being administered in this court; Mr. Kerrison being a bankrupt, his estate is being administered in the Court of Bankruptcy, and the trustee of Mr. Kerrison's estate brings in this proof on behalf of what I call the joint estate against the separate estate of Sir R. Harvey, which is being administered in this court, and it is admitted, and it could not be disputed, that it must be administered upon the same principles as if Sir R. Harvey had lived and had been made a bankrupt together with Mr. Kerrison. The real question, therefore, is, whether or not it is a case in which what is called the joint estate can prove in bankruptcy against the separate estate?

543] *Now, grosser cases of fraud I never saw. They are not only legal but moral frauds. The whole of these transactions took place on the part of Sir R. Harvey, with a view, no doubt, of cheating his partner. These accounts were made up in a way which was intended to deceive his partner, and probably intended to deceive, as far as he could, the clerks in the establishment also. No man makes fictitious entries and commits forgeries except to conceal that which he knows ought to be concealed for his own credit; and therefore one cannot doubt for a moment that Sir R. Harvey was perfectly well aware he was committing these frauds, and committing them in the hope (as one often sees) that some successful speculation or other would put him in funds and enable him to pay off these large defalcations, and set himself right once more before the world.

Now the character of the transaction, as I said before, can only be described as simply stealing. It is not necessary, however, as I understand the rules of bankruptcy, to put the case quite so high—it is not necessary for the joint estate to prove more than in the words of Lord Eldon (*Ex parte*

Harris ⁽¹⁾), "that this overdrawing was for private purposes and without the knowledge, consent, privity, or subsequent approbation of the other" partners. If that is shown, it is *prima facie* a fraudulent appropriation within the rule. Lord Eldon further says: "It is as much a fraud within Lord Thurlow's rule as if, according to the expression I am informed I formerly used, he had stolen the property." In this case there was intentional fraud, though in a few exceptional cases there are overdrawings which do not amount to actual stealing; but with those few exceptions there can be no doubt that is the appropriate description of the transaction. That being so, and the plaintiffs having proved all this, they carry in a claim for the amounts so appropriated, giving credit for the amounts repaid. The accounts have been investigated in my chambers for a very long period. Accountants of eminence, experience, and skill, have been employed on both sides, and time has been allowed under circumstances which I am going to mention—a very long time—to investigate these accounts; and the result is, as far as I am concerned, I see no necessity for taking any further accounts.

*[His Lordship then discussed the course of proceeding in taking the accounts.] [544]

That Sir R. Harvey's estate would be liable in equity to make good the amount, I do not think any one can doubt. If he had been alive, a bill might have been filed against him, or an action I should say now, brought by his partner, compelling him to restore back to the partnership funds the sums he had unlawfully abstracted from them. In the same way, if he had become bankrupt, there is no doubt that a proof might have been made against him under the principle laid down by Lord Eldon, and, both being bankrupt, by the joint estate, for the sum so appropriated. Why is the proof not to be allowed?

I am told, first of all, that the principle of these cases, which is plainly stated in *Ex parte Harris* ⁽²⁾, was wholly misunderstood, and that you could not prove on behalf of the joint estate unless you had shown that the separate estate had been increased by the sums misappropriated.

Now, there is a little fallacy, as it appears to me, in that proposition, state it how you will. What is the meaning of the separate estate being increased? A man's separate estate is increased by what money he puts into his pocket, and, therefore, the moment an individual partner abstracts the money of the partnership and puts it into his pocket for

⁽¹⁾ 2 V. & B., 214.

⁽²⁾ 2 V. & B., 210.

private purposes, it must be, as Lord Eldon puts it (¹), “for the increase of the individual’s estate.” If that was the meaning of the proposition, it was correct. It is not because he makes the partnership liable by his wrongful act, which was one of the two branches of *Fordyce’s Case* (²); but it is because he has appropriated the property or money of the partnership to his individual use that his separate estate is liable.

But the argument used before me was this: that you must show that some of the property remained to the benefit of the partner’s private estate, and that if he gambled away the money the moment he got it, or paid it away for some other purpose, so that the private estate did not get any benefit eventually, you could not prove against the separate estate. I can find no trace of any such doctrine. It is contrary to what Lord Eldon says, and contrary *to good sense and principle, because the man who has misappropriated this money, or taken it away from the firm, and has applied it in payment of any debt due from him, whether a debt (so called) of honor, or a legal debt—to the extent he so pays it, thereby relieves the rest of his property. If in the case which actually occurred, when Sir Robert Harvey was called upon to pay £30,000 or £40,000 for stock he had purchased, he had taken his deeds to his bankers and had pledged them and raised money upon them, and had paid the money in that way, he would have made his real estate liable to repay it, in case he had become bankrupt, and to that extent he would have diminished his private or separate estate. If instead of doing that he took the money out of the bank, that in the same way increased his separate estate by the amount he so took; because it left the landed estate unincumbered instead of being incumbered to that amount. So that, taken in that way, the private estate is increased. I will go further, and I say on the authorities, if a man steals £100,000 and appropriates it to gambling debts, as Lord Eldon says, that increases his private estate, and it is quite immaterial that the other private estate is in exactly the same position as it was before; there is no distinction when you come to prove. There would be a distinction if you came to a question of following the property which is very material. If instead of the money having been spent you could show, what I suppose happens very seldom, that the man who stole the money invested it in property, and you could identify the property, that would not be a case of proof at all; it would be a case of restora-

(¹) 2 V. & B., 214.

(²) Cooke’s Bankruptcy Law, 8th ed., p. 531.

tion. You would take away the property from the private estate and put it into the joint estate; you would follow the property under the well known rule in equity, you would trace the firm property into the form of an investment, and the firm would take it away altogether. You would not prove. The doctrine of proof assumes that the property now no longer remains in specie; that it cannot be followed or identified; and that is the reason why you can only prove and not take the property back again.

The whole foundation of the doctrine of proof in these cases rests upon this, that in a court of equity for many purposes the joint estate is treated as a distinct estate, in the same way as you *can compel a partner, if not [546 a bankrupt, to restore funds misappropriated by repaying them to the firm account, so that, when the partner is bankrupt, proof can be tendered on behalf of his estate for the sum taken.

That, I think, disposes of the chief argument presented to me on behalf of the Stock Exchange creditors. The argument presented to me on behalf of the plaintiff was of a different character. It was said, first of all, that the drawing of Sir R. Harvey might be attributed to his capital brought in. That, however, would be no defence if he had brought in any capital; and I do not think, on the evidence, that he did. But supposing he had capital, by the partnership articles he had no right to draw it out; and if a partner, although he has some capital to his credit, takes away against the partnership articles money which he appropriates to his own use, the firm has a right to have it brought back again, and it is quite immaterial that the actual capital was taken. It might be material when you were discussing the question of moral fraud whether a man took what was really his own or somebody else's property; but, looking at it in a legal point of view, it is an appropriation contrary to the condition expressed or implied in the partnership articles that the capital is to remain for the joint benefit of himself and the partnership. It is quite as much contrary to the partnership articles for him to draw out a sum not exceeding that capital as if he were to draw out a sum exceeding that capital.

The next point taken was this: It was said that if the breach of faith has been acquiesced in by the copartner, you cannot prove. I agree, if one partner has stolen the partnership property, and the other partner knows it and consents to his retaining it, you cannot prove. It is then an ordinary debt, for which no proof can be allowed. If

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that is the sense in which acquiescence is used, then I say if he has acquiesced the proof is barred. Acquiescence really means a standing by with knowledge of your right, as it is said, both in fact and law. In order, therefore, to make out acquiescence in that sense you must make out knowledge on the part of the copartner, and then that he stood by and allowed the state of affairs to continue without remonstrance.

Now, first of all, what did Mr. Kerrison know? He says 547] that *he knew nothing of these frauds. He did know on two occasions, on two half years, in 1863 and 1864, that Sir R. Harvey had drawn out some moderate amounts compared to the large amounts we are now speaking of; but he also knew, from the subsequent accounts, that it was alleged or represented to him, and he believed that those sums had been repaid. It was suggested that that alone would authorize Sir R. Harvey to overdraw any amount he thought fit to appropriate to his own use. I entirely dissent from any such proposition. You may, no doubt, waive partnership articles, either by actual waiver—that is, a waiver in so many terms, by a new contract made in writing, or by parol, or by conduct; that is, a certain state of circumstances having occurred contrary to the partnership articles known to all the partners and long suffered by them to continue with such knowledge, may authorize a court of justice to infer an actual contract that that shall be the new state of things, and to that extent the articles are waived or altered. But that must depend upon circumstances. You must not assume from a course of conduct anything absolutely irrational and absurd. The mere fact that the partner has been allowed by his copartner, contrary to the partnership articles, to overdraw his account on two occasions would not imply anything so absurd as that he was to be allowed to overdraw it to any extent and whenever he liked; *a fortiori*, when we find that soon afterwards he restored, or appeared to restore, the amount overdrawn, and that no further overdrawings were known to have taken place. It appears to me that would not be a fair inference at all from what occurred, and, therefore, you cannot impute to Mr. Kerrison any license whatever to Sir R. Harvey to overdraw the account in the way he did. But it must be recollected that the element of knowledge is wanting as regards the actual overdrawings beyond these two, and he certainly did not acquiesce in them.

But it is said, though he did not know anything about these frauds, still he had constructive notice that these

frauds were going on. First of all, I am not aware that constructive notice will do. None of the authorities which have been cited to me say it will do. The words of Lord Eldon are—he uses four words where probably fewer would have done—“knowledge, consent, privity or subsequent approbation.” Now, he has had neither knowledge, consent, *nor privity; because he did not know of it at [548 the time, and the only other words that can be relied on are “subsequent approbation.” But constructive notice is not subsequent approbation. You cannot have subsequent approbation without knowledge. Therefore I do not see how it would avail even if it were proved. But the supposed constructive notice was of the most singular kind. What occurred was this: there was a person of the name of Hill who was what they called manager of the bank; he was appointed by Sir R. Harvey. His appointment was known to Mr. Kerrison, who consented to the appointment on the formation of the partnership. There was a person of the name of Richardson, who seems to have been next in order in the hierarchy of the bank to Mr. Hill; and there were some other clerks, notably bill clerks. It is said that one or more of these persons knew of the frauds that Sir R. Harvey was committing, and that if they did know, their knowledge is to be imputed constructively to Mr. Kerrison, and, as they must have known it for a long time, their knowledge therefore is to be imputed to Mr. Kerrison for a long time, and he must be taken to have stood by with knowledge, and to have acquiesced or given subsequent approbation. That is the argument that has been presented to me. And it is said that this must have been so because these clerks were agents of the banking firm, and therefore notice to them was notice to the banking firm, and notice to the banking firm was notice to every partner.

Now, it must be remarked, the whole of that train of reasoning is as unfounded, as it appears to me, in fact as it is in law. First of all, as to the fact. It was not proved that Hill knew; it was not proved that Richardson knew. Hill was not called, but what was suggested was this, that they being persons of experience in banking, and being in the bank with the ordinary knowledge possessed by persons in their position, must have ascertained that some of these entries were fictitious and fraudulent. In the first place, it is not the habit of the court to impute knowledge in this way. It would, in fact, not fall short of criminal conspiracy, which I am asked to impute to them, to join Sir R. Harvey in defrauding Mr. Kerrison. The court is in the habit of re-

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quiring proof in such a case as that. I do not know the state of these men's minds. I cannot impute to them that, from 549] merely occupying particular *positions, they were in all respects fit to occupy them. They may have been selected by Sir R. Harvey because they were stupid or unobservant men, or men who would not be likely to detect his frauds—men whom he could easily deceive. I am not at all at liberty to assume, for the purpose of fastening a criminal charge against these men, that they had all the knowledge that I am desired to impute to them; still less, when one has not been called, and the other has not been asked, am I at liberty to impute this knowledge to them. Men are often ignorant of what they do not wish to see, and I think it very probable they knew something was wrong, or suspected something was wrong, but I think it equally probable, as was the case apparently with the bill clerks, that although they suspected something was wrong, they knew their bread depended on their not investigating, and they were only too anxious not to inquire or find out more. Therefore I have no reason whatever to impute to them knowledge, and you must show knowledge in the agent before you can impute constructive notice to the principal. So much for the fact.

But, assume they did know, what does it amount to? It amounts to this: with that knowledge they were confederates with Sir R. Harvey, in cheating Mr. Kerrison. Will that be notice to Kerrison? It is against the very first principles on which the doctrine of constructive notice is founded. They are the very last persons in the world who would inform Kerrison. The theory of constructive notice is that the person who has the knowledge will inform the other for whom he is agent; but where, from the nature of the case, it is obvious they will do no such thing, then there is no constructive notice at all. But more than that, the doctrine of constructive notice, as applied to a partnership firm, no doubt makes the clerk or agent of the firm a person whose knowledge will affect the firm as a firm with constructive notice, and in that sense will make every partner liable for the consequences of the constructive notice as a member of the firm, but no one has ever carried that doctrine to this extent, that the knowledge of the agent of the firm shall be the knowledge of the individual partner as between himself and his copartner; in fact, all the cases in equity with which I am familiar have proceeded on the op- 550] posite *doctrine. I may mention such cases as *Raw-*

ins v. Wickam (¹), and many others. No one suggested for a moment that, as between the partners, a clerk is to be considered the agent, and the reason for it is obvious. The clerk is agent for both as regards third persons; he gives the knowledge or notice to both; but as between the two, why should he be supposed to communicate to one the rogueries of the other? I see no reason whatever, and in my opinion that argument fails.

Then the next reason was this: even supposing Kerrison did not know, as he did not know in fact, and had no constructive notice which would have been sufficient in law, as I think it would not have been, still he was guilty of laches or gross negligence, and his creditors or depositors in the bank are barred by that negligence from any right of proof. First of all, what is the meaning of the accusation of gross negligence by a pickpocket against the man whose pocket he has picked, who says: "If you had buttoned up your pocket I should not have been able to pick it so easily?" The case is really that, and only requires to be stated to show how absurd the proposition is. If Kerrison had been solvent, and had filed a bill against Sir R. Harvey, who had also been solvent or able to pay something, and had asked for a judgment that Sir R. Harvey should restore to the bank the sums he has misappropriated, could a defence on the part of Sir R. Harvey have been admitted to this effect: "True, I have stolen your money, but I have stolen it six or seven years consecutively to a very large amount, and if you had been a careful man you would have found it out long ago, and therefore I am entitled to keep your money, and dismiss your action with costs?"

Now, applying the argument, which must be done fairly, to both sides, if the creditors, that is, the depositors of the bank, are to be bound by the laches of Mr. Kerrison, the stockbrokers, the creditors of Sir R. Harvey, must also be bound by his conduct, and, therefore, if, as between Kerrison and Sir R. Harvey, no such defence will be admitted, it is plain that no such defence ought to be admitted as between the joint estate and the separate estate.

*There was one more argument on that part of the [550 case which I can hardly treat more seriously, although I cannot pass it by. It was said that this was like the case of reputed ownership in bankruptcy, that the stockbrokers had been induced to give credit to Sir R. Harvey by the neglect of Mr. Kerrison, that if he had intervened sooner and broken up the bank and driven Sir R. Harvey into bankruptcy the

(¹) 3 De G. & J., 304.

stockbrokers would not have given credit to him, and they would not have lost so much. I do not know that at all. I have no means of ascertaining what the position was between Sir R. Harvey and the stockbrokers, or to what extent they trusted him, or on what ground they trusted him, or what they knew about his proceedings. I should have thought if they did know (it does not appear that they did, because he transacted business through several stockbrokers) the extent of the speculative transactions of Sir R. Harvey, they would not have trusted him at all. But I am not at liberty to indulge in any such speculations. I cannot find that there was any representation by Kerrison to the stockbrokers, or that they acted upon any representation by him, direct or indirect, that Sir R. Harvey was solvent. All they appear to have known was that Sir R. Harvey was carrying on an old-established business at Norwich, and was reputed to be a man of property and position in the county. I cannot see for a moment any analogy at all between the doctrine of reputed ownership in bankruptcy and the question of taking the account between the joint and separate estates. It appears to me that the argument has no bearing at all. [His Lordship then considered the arguments in favor of further delay and the production of further accounts, for which he was of opinion no sufficient ground had been shown.]

Therefore I have come to the conclusion that I ought to allow the claim as asked; and as regards costs, I am afraid I am bound by the general order which adds the costs to the sum claimed; but I have made an exception in more than one instance as regards the costs of adjournment into court. I intend to do so in the present instance. Instead of following the decision of my predecessor and others, I shall allow the costs of the adjournment into court out of the estate, adding the rest of the costs in the usual way. The costs of the plaintiff, of course, will be costs out of the 552] *estate, and I shall give no costs to the stockbrokers' representative. That is according to the terms of the order. Besides that, he is liable to additional costs occasioned by his intervening, and no doubt very considerable additional costs have been occasioned; but, considering that I am deciding against them, and therefore they will in effect lose all further claim on the estate, I think it would be a harsh order to make them pay any further costs. Therefore I make no order whatever as to their costs.

By the order of the Master of the Rolls as drawn up the claims were admitted at £600,000.

The representative of the separate creditors appealed from this decision, and the appeal came on for hearing on the 4th of August, 1876.

Benjamin, Q.C., *Davey*, Q.C., *B. B. Rogers*, and *Dundas Gardiner*, for the appellant: We contend, first, that this claim ought not to have been admitted at all; and, secondly, that, if admitted, it ought to be reduced. As regards the first point, Sir R. Harvey, it cannot be denied, made false entries, committed forgeries, and grossly defrauded his partners. Now, no doubt, if a trader increases his separate estate by a fraud on his partners, there is a right of proof against his separate estate; but we contend that the rule goes no further; the fraud which gives a right of proof is a fraud in the nature of a fraudulent preference. Where a partner steals money from the firm and gambles it away, his separate estate is not increased at the expense of the partnership estate, and we contend that in such a case there is no right of proof: *Fordyce's Case* (1); *Ex parte Lodge* (2); *Ex parte Broome* (3); *Ex parte Grill* (4). The Master of the Rolls relied on *Ex parte Harris* (5); but in that case the proof was rejected, and everything cited against us is a mere *dictum*. The same remark applies to *Ex parte Smith* (6).

**Ex parte Watkins* (7) was a clear case of increasing [553 the private estate at the expense of the joint. In *Ex parte Turner* (8) and *Ex parte Hinds* (9) the proof was rejected under circumstances very similar to the present. Moreover, in the present case R. Harvey was allowed to have the sole and uncontrolled management of the business, and no partner who acquiesced in this, can, as against third parties, be heard to complain of anything that Harvey did. We contend, therefore, that the proof ought not to be admitted at all.

JAMES, L.J.: We are unanimously of opinion that we are bound by the law as laid down in *Ex parte Harris* (10). What have been called *dicta* appear to us to be deliberate and conclusive statements of the law, which have never since been departed from. The rule there laid down by Lord Eldon, who understood bankruptcy law better than any man then living, is, that if a partner fraudulently takes money out of the partnership assets for his own private

(1) Cooke's Bankruptcy Law, 8th ed., p. 531.

(2) 1 Ves., 166.

(3) 1 Rose, 69.

(4) Cooke's Bankruptcy Law, 8th ed., p. 530.

(5) 2 V. & B., 210.

(6) 1 Gly. & J., 74; 6 Madd., 2.

(7) Mont. & Mac., 57.

(8) Mont. & A., 52; 4 D. & Ch., 169.

(9) 3 De G. & Sm., 613.

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purposes, a proof can be made for it against his separate estate. As regards the argument that the separate estate has not been enlarged, it is enlarged if the joint estate is employed in paying sums which the separate estate ought to have paid. If the sums which became due to the stock-brokers had not been paid out of the joint estate, they could have been proved against the separate estate, so no wrong is done to the creditors. If you can show that any of the overdrawings were simple overdrawings, not tainted by fraud, the case will be different as to them.

Appellant's argument continued: As to reducing the amount, we say that the principle of *Clayton's Case* (1) ought to have been applied. Sir R. Harvey's drawings were not all tainted with fraud, and he paid in from time to time considerable sums. If, then, the account be taken according to *Clayton's Case*, the amount fraudulently drawn will be found to have been to a considerable extent repaid. 554] *JAMES, L.J.: I am of opinion that *Clayton's Case* (1) cannot be applied to fraudulent items. If, indeed, a partner fraudulently draws out £10,000, and then pays in a sum of £10,000, specifically appropriating it with his partner's knowledge to meet the sum drawn out, there is an end of it; but if he goes on manipulating the accounts, and concealing the fraud from his partner, the fraud must be made good when it is discovered. Sums of money which he paid in and entered in the books must be attributed in the first place to moneys drawn out, which were also entered in the books.

MELLISH, L.J.: Suppose a partner fraudulently draws out £20,000, and then draws out openly £10,000 more, which he enters in the books, so that it is a simple overdraw without fraud. He then pays in £30,000. It is contended that he has repaid the £20,000, and that unless he makes further fraudulent overdrawings there is no right of proof against his separate estate. But suppose he openly draws £30,000 out again, the firm is cheated of the £20,000 just as much as if he had never paid in the £30,000. I am of opinion, therefore, that *Clayton's Case* cannot be applied to fraudulent debts of this nature.

BAGGALLAY, J.A., concurred.

The case then stood over, owing to the arrival of the Long Vacation.

On the 8th of November the case was in the paper, but the counsel for the appellants stated that, after the decision

(1) 1 Mer., 585.

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on the above questions of law, it was useless for them to argue the case further.

The appeal was therefore dismissed without further argument.

Solicitors: *Sole, Turners & Knight; Linklaters & Co.; Travers, Smith & Co.; Lyne & Holman.*

As a general rule, where members of a firm have access to its books, and opportunity to know how their accounts are kept, it will be presumed they know how the entries were made therein, and they are competent evidence against them: *Fairchild v. Fairchild*, 64 N. Y., 471, 480; *Price v. Wilson*, 67 Barb., 11; *Taylor v. Herring*, 10 Bosw., 447; *Dunnell v. Henderson*, 23 N. J. Eq., 174; *Heartt v. Corning*, 3 Paige, 566; *Caldwell v. Lieber*, 7 Paige, 507; *U. S. v. Binney*, 5 Mason, 188; *Stuart v. McKichan*, 74 Ills., 122; *Buddeke v. Ratterman*, 2 Tenn. Chy., 459.

Such presumption, however, is not conclusive, but may be rebutted by the circumstances: *Price v. Wilson*, 67 Barb., 11; *Taylor v. Herring*, 10 Bosw., 447; *Dunnell v. Henderson*, 23 N. J. Eq., 174; *Heartt v. Corning*, 3 Paige, 566; *Caldwell v. Lieber*, 7 Paige, 507; *U. S. Bank v. Binney*, 5 Mason, 188; *Stewart's Case*, L. R., 1 Chy., 574; *Buddeke v. Ratterman*, 2 Tenn. Chy., 459.

As between the partners partnership books are not evidence for one partner against another, on an accounting between them, unless it appears, or may be presumed from the circumstances, that the latter not only had access to the books, but actually inspected them: *Taylor v. Herring*, 10 Bosw., 447.

So in a suit against stockholders and directors of a corporation, the books of the corporation are presumptive evidence against them: 1 Greenl., Ev., § 493; *Bretham v. Cooke*, *Arnold & Hodges*, Q. B., 306; *Culver v. Third*, etc., 64 Ills., 529; *Allen v. Coit*, 6 Hill, 318.

And so of the acts and doings of the corporation generally: *Collins v. Suaw*, 7 Rob., 632; *Sherman v. N. Y. Cent. Mills*, 1 Abb., 187, 189.

The books of a corporation, however, are not, ordinarily, evidence against strangers to establish a claim against such stranger: 1 Greenl. Ev., § 493.

Though they are usually of the acts and doings of the corporation, but it must be made to appear that they are the books of the corporation, kept as such by the proper officer, or some other person authorized to make entries in his necessary absence.

It is not sufficient to prove the book to be in the handwriting of a person stated in the book itself to be the secretary, but not otherwise shown to be the proper officer: *President, etc., v. McKean*, 10 Johns., 154; 1 Greenl. Ev., § 493.

The principal case seems to be based upon the equitable doctrine that in a contest between partnership creditors and individual creditors, the partnership property shall be applied to the payment of firm debts, and the individual property of the partners to the payment of individual debts. This rule is well established.

See note to *Howell v. Tell*, 29 N. J. Eq., 490; 2 Story's Eq. Jur., § 1253, *et seq.*

Canada, Upper: *Moore v. Riddell*, 11 Grant's Chy., 69; *Wallace v. James*, 5 Grant's Chy., 163.

Delaware: *Bailey v. Kennedy*, 2 Del. Chy., 12.

Illinois: *Hurlburt v. Johnson*, 74 Ills., 64.

Indiana: *Conant v. Frary*, 49 Ind., 530; *Mendian, etc., v. Brandt*, 51 Ind., 56; *Smith v. Evans*, 37 Ind., 526.

Maryland: *McCulloch v. Dashiell*, 1 Harris & Gill, 97.

Mississippi: *Williams v. Gage*, 49 Miss., 777.

New Hampshire: *French v. Lovejoy*, 12 N. H., 458.

New Jersey: See *Howell v. Tell*, 29 N. J. Eq., 490.

New York: *Collumb v. Read*, 24 N. Y., 505, 16 N. Y., 484; *Wilson v. Robertson*, 21 N. Y., 587; *Menagh v. Whitwell*, 52 N. Y., 147; *Berkshire, etc., v. Juillard*, 13 Hun, 506; *Whittemore v. Elliott*, 7 Hun, 518; *Hewitt v. Brackett*, 9 Hun, 543; *Ganson v. La-*

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throp, 25 Barb., 455; Kendall v. Rider, 35 Barb., 100; Knauth v. Bassett, 34 Barb., 31; Goertner v. Trustees, 2 Barb., 625; Ransom v. Vandeventer, 41 Barb., 307; Wilder v. Keeler, 3 Paige, 167; Payne v. Matthews, 6 Paige, 19.

See Smith v. Howard, 1 Buff. Superior Court Rep., 5; Artisans' Bank v. Treadwell, 34 Barb., 553; Dimon v. Hazard, 32 N. Y., 65; Morgan v. Skidmore, 55 Barb., 263, affirmed 2 Albany L. J., 457; Wills v. Simmonds, 51 How. Pr., 48.

Ohio: Rogers v. Meranda, 7 Ohio St., 179.

See, however, in this state, Brock v. Bateman, 25 Ohio St. R., 609, if *no* partnership assets.

Pennsylvania: Black's Appeal, 44 Penn. St. R., 503; Foster v. Barnes, 81 Penn. St. R., 377.

United States, Circuit and District: Osborne v. McBride, 3 Sawyer, 590; Crane v. Morrison, 4 Sawyer, 139.

See Case v. Beauregard, 1 Wood. C. C., 125.

West Virginia: Carper v. Hawkins, 8 West Va., 291.

Wisconsin: Viles v. Bangs, 36 Wisc., 132.

The rule extends to real estate owned by the partnership: Conant v. Frary, 49 Ind., 530; Fairchild v. Fairchild, 64 N. Y., 471; Snyder v. Lunsford, 9 W. Va. Rep., 223; Kendall v. Rider, 35 Barb., 100; Collumb v. Read, 24 N. Y., 505; Traphagen v. Burt, 67 N. Y., 30; Hiscock v. Phillips, 49 N. Y., 97; Ross v. Henderson, 77 N. C., 170; Willet v. Brown, 65 Mo., 138; 5 Wait's Actions and Defences, 119 *et seq.*

Even though the title be held by one partner for the benefit of the firm; Fairchild v. Fairchild, 64 N. Y., 471; Snyder v. Lunsford, 9 West Va. Rep., 223; Ross v. Henderson, 77 N. C., 170.

As to how far the rule applies where there is no partnership assets, or only a nominal amount, see note to Howell v. Tell, 29 N. J. Eq., 490; Brock v. Bateman, 25 Ohio St. R., 609; Sto. on Part., § 363; Somerset, etc., v. Minot, 10 Cush., 600; Black's Appeal, 44 Penn. St. R., 507, and cases cited; McCulloh v. Dashiell, 1 Harris & Gill, 96; Rogers v. Meranda, 7 Ohio St., 179.

As to how far the rule applies where one partner sells to another who agrees to pay the firm debts, as between the creditors and the remaining partner,

see Tenney v. Johnson, 43 N. H., 144; Caldwell v. Scott, 54 N. H., 418; Smith v. Howard, 1 Buffalo Superior Court Rep., 5, 8, and cases cited; Phelps v. McNeeley, 66 Missouri, 554; Dimon v. Hazard, 32 N. Y., 65; Menagh v. Whitwell, 52 N. Y., 147; Cory v. Long, 2 Sweeney, 491; Arnold v. Nichols, 64 N. Y., 117.

As between the retiring and the remaining partner, see Carper v. Hawkins, 8 W. Va., 291; Foster v. Barnes, 81 Penn. St. R., 377; Crane v. Morrison, 4 Sawyer, 139; Smith v. Howard, 1 Buff. Superior Court Rep., 8, and cases cited; Goertner v. Trustees, 2 Barb., 625; Davis v. Grove, 2 Rob., 136; Kohler v. Matlage, 6 N. Y. Weekly Dig., 116.

Individual creditors who have trusted the individuals of a firm, on the strength of real estate owned by them as tenants in common, before the formation of any partnership, are entitled to be paid out of such real estate in preference to firm creditors, who gave credit to a subsequent partnership in which the real estate was agreed to be treated as, and to be, partnership property, even as against improvements made with partnership funds, no fraud being intended: Parker v. Bowles, 57 N. H., 491.

See Ross v. Henderson, 77 N. C., 170.

In Meily v. Wood, 71 Penn. St. R., 488, it was held that an individual judgment creditor had no lien on real estate owned by a firm, as against a purchaser from the firm as such.

If judgment be recovered against a firm, on a firm debt, it becomes a lien on the separate real estate of each partner: Foster v. Barnes, 81 Penn. St. R., 377; Meech v. Allen, 17 N. Y., 300.

See note to Howell v. Tell, 29 N. J. Eq., 490, and cases cited; Stevens v. Bank, 31 Barb., 90.

Otherwise as to a levy upon partnership property, upon an execution against one of the partnership, as against a subsequent levy on an execution against the firm: Eighth National Bank v. Fitch, 49 N. Y., 539; Osborne v. McBride, 3 Sawyer, 590; Plintoff v. Dickson, 10 U. C. Q. B., 428; Wilson v. Vogt, 24 U. C. Q. B., 635; Taylor v. Jarvis, 14 U. C. Q. B., 128; Fargo v. Ames, 45 Iowa, 491; Bogue's Appeal, 34 Leg. Int., 13, 83 Penn. St. R., 101; Artisans' Bank v. Treadwell, 34 Barb., 553; Abels v. Westervelt, 15 Abb. Pr.,

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230, as explained in *Smith v. Orser*, 43 Barb., 191.

See *Smith v. Evans*, 37 Ind., 526; *Clark v. Corbett*, 27 U. C. Q. B., 161; *Crane v. Morrison*, 4 Sawyer, 139; *Van-alstyne v. Cook*, 25 N. Y., 489; note to *Howell v. Tell*, 29 N. J. Eq., 490; *Cram v. French*, 1 Wend., 311; *Dunham v. Murdock*, 2 Wend., 553; *Matter of Smith*, 16 Johns., 102; *Scrugham v. Carter*, 12 Wend., 131; *Berry v. Kelly*, 4 Rob., 106; *Artisans' Bank v. Tredwell*, 34 Barb., 553; *Greene v. Buck*, 32 Barb., 73.

One partner has no right to apply the partnership funds in payment of his individual debt without the assent, express or implied, of his co-partners: *Ransom v. Vandeventer*, 41 Barb., 307; *Hiscock v. Phelps*, 49 N. Y., 97; *Viles v. Bangs*, 36 Wisc., 132; *Caldwell v. Scott*, 54 N. H., 414; *Conant v. Frary*, 49 Ind., 530; *Snyder v. Lunsford*, 9 W. Va., 223; *Stegall v. Coney*, 49 Miss., 761; *Ackley v. Staeklen*, 56 Mo., 561; *Phelps v. McNeeley*, 66 Missouri, 558; *Menagh v. Whitwell*, 52 N. Y., 146; *Flanagan v. Alexander*, 50 Missouri, 50; *Thomas v. Permrich*, 25 Ohio St. R., 55; *Goertner v. Trustees*, 2 Barb., 625; *Davison v. Grove*, 2 Rob., 136; *Walsh v. Kelly*, 27 How., 359; *Fasset v. Talmadge*, 18 Abb., 48, reversed on another point, 32 N. Y., 457; *Graves v. Cudney*, 5 Cow., 489.

See *Davis v. Spencer*, 24 N. Y., 386; *Robbins v. Fuller*, 24 N. Y., 570; *Kendall v. Rider*, 35 Barb., 100; *Corwin v. Suydam*, 24 Ohio St. R., 209; *Fox v. Rose*, 10 U.C. Q. B., 16.

A sale by a partner, in payment of his own debt, of goods which are in fact goods of the partnership, but which the partnership has so intrusted to him as to enable him to deal with as his own, and to induce the public to believe to be his, and which the creditor receives in good faith and without notice that they are the goods of the partnership, is valid against the partnership and its creditors.

A. sold his interest in a partnership to B. and C., his former copartners,

who formed a new firm, and gave A. in payment a promissory note signed B. & Sen. When the note came due, A. received in payment property which had formed part of the assets of the old firm, but which then belonged to a new firm, doing business under the name of B. & Co., of which B. and C. were the general partners, and D. was a special partner. In an action of replevin brought by A. against an officer who attached the goods in his hands as the property of the new firm, there was evidence that A., who had taken a bill of sale from "B. & Co.," bought in good faith; that he had no knowledge of the existence of the new firm, except from a vague rumor, and never knew that it did business, or that D. was a partner. Held, that upon this evidence the jury would be warranted in finding for the plaintiff: *Locke v. Lewis*, 124 Mass., 1.

Nor does it make any difference whether or not the creditor knew that it was partnership property that was thus applied in payment of his debt: *Caldwell v. Scott*, 54 N. H., 414; *Ackley v. Staehlen*, 56 Mo., 561; *Phelps v. McNeeley*, 66 Mo., 558; *Ransom v. Vandeventer*, 41 Barb., 307.

As to the interest which a mortgagee takes under a mortgage or sale, by one of several partners, for an individual debt upon partnership property, see *Smith v. Evans*, 37 Ind., 526; *Fargo v. Ames*, 45 Iowa, 491; note to *Howell v. Tell*, 29 N. J. Eq., 495; *Menagh v. Whitwell*, 52 N. Y., 147; *Hiscock v. Phelps*, 49 N. Y., 97; *Morss v. Gleason*, 64 N. Y., 204; *Staats v. Bristow*, 7 N. Y. Weekly Dig., 51, Court Appeals.

See *Smith v. Orser*, 42 N. Y., 182, 43 Barb., 187; *Harris v. Murray*, 28 N. Y., 574; *Ford v. Smith*, 27 Wisc., 261.

The wife of one partner is not entitled to dower in real estate owned by a partnership: *Willet v. Brown*, 65 Mo., 138.

See 5 Wait's Actions and Defences, 121.

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[4 Chancery Division, 555.]

C.A., Nov. 30; Dec. 21, 1876.

555] **Ex parte* SAFFERY. *In re* COOKE.*Bankruptcy—Stock Exchange Rules—Fraudulent Preference.*

An assignment of part of the property of a man who is unable to meet his engagements to a trustee for a special class of creditors is not prevented from being a fraudulent preference by any amount of pressure.

According to the rules of the Stock Exchange a member who is unable to meet his engagements on the Stock Exchange is declared a defaulter, ceases to be a member, and cannot be re-admitted unless he pays 6s. 8d. in the pound on his Stock Exchange debts. According to the same rules his Stock Exchange assets are collected by the official assignees of the Stock Exchange, and distributed among the Stock Exchange creditors. A member who had been declared a defaulter attended the usual meeting of the Stock Exchange creditors and gave to the official assignees, for distribution among his Stock Exchange creditors, a check on his bankers for £5,000, being about five-eighths of his assets, stating at the same time that he had none but Stock Exchange creditors. On the day after this sum had been distributed the debtor informed the Stock Exchange creditors that his father-in-law claimed to be a creditor for a large amount for money lent. It did not appear that up to this time the debtor had committed any act of bankruptcy, but soon afterwards he filed a liquidation petition, and was adjudged bankrupt:

Held (reversing the decision of the Registrar), that the trustee in bankruptcy was entitled to recover the £5,000 from the official assignees of the Stock Exchange.

[4 Chancery Division, 562.]

C.A., Dec. 16, 18, 1876.

562] **In re* BRENTWOOD BRICK AND COAL COMPANY.*Vendor and Purchaser—Vendor's Lien.*

It was agreed between A. and a trustee for an intended company that as soon as the company was formed and had adopted the agreement, A. should sell and the company purchase A.'s interest in a leasehold brickfield, and that on an assignment to the company being executed the company should pay him as the purchase-money £8,000 in manner thereafter mentioned, namely, £6,000 in cash and £2,000 in fully paid-up shares. The property was assigned to the company by a deed which stated the consideration to be £6,000, to be paid to A. as thereafter mentioned, viz., 50 per cent. on all sums of money to be received from sale of shares, and 50 per cent. on all moneys borrowed by the company by way of capital until the £6,000 was paid. The company became abortive; no money was ever received by sale of shares, or borrowed, and ultimately the company was ordered to be wound up:

Held (affirming the decision of Malins, V.C.), that the nature of the contract was such as to exclude vendor's lien, and that A. had no lien on the leasehold premises.

THIS was an appeal from an order of Vice-Chancellor Malins directing the proceeds of the sale of a leasehold brickfield, on which the appellant claimed a vendor's lien, to be disposed of as part of the assets of the Brentwood Brick and Coal Company, Limited.

By an agreement dated the 16th of October, 1874, made between the appellant of the one part, and J. R. Banner, as

trustee for a company intended to be formed, and called The Brentwood Brick and Coal Company, Limited, of the other part, it was agreed that so soon as the company should have been formed and registered under the Companies Acts, and the directors should have adopted the agreement and proceeded to an allotment of shares, the appellant should sell and the company purchase the good-will, plant, machinery, and implements of the appellant in his manufactory of bricks and business of a coal merchant at Brentwood. That the company, upon an assignment and transfer of such good-will, plant, machinery, and business, and other effects, being made, should, in consideration thereof, pay out of the funds of the company to the appellant, his executors, administrators, or assigns, as and for the purchase- [563 money of the same, the sum of £8,000 in manner thereafter mentioned, namely, the sum of £6,000 in cash, and the further sum of £2,000 by delivery to the appellant, his executors, administrators, or assigns, or his or their nominee or nominees, of 400 shares in the company upon which £5 per share should be taken as having been paid. And the appellant, for the consideration aforesaid, agreed to execute an assignment to the company of the lease of his business premises.

The company was registered on the 2d of November, 1874, under a memorandum and articles, with a capital of £25,000 in 12,500 shares of £2 each. The articles referred to the agreement and provided that "The directors may pay out of the funds and capital of the company to the vendor the sum of £8,000, the agreed purchase-money for the property as before-mentioned, and they may pay the said sum in such manner and form as they and the vendor may agree upon."

The agreement was adopted by the company, and the assignment from the appellant to the company was effected by an indenture dated the 26th of February, 1875, by which, after reciting that the appellant had agreed with the company for the sale to them of the land and premises in the lease for £6,000, to be paid to the appellant as thereafter mentioned, that was to say, 50 per cent. of all sum or sums of money received or to be received by the company on the sale of shares, and the like sum of 50 per cent. upon all money by way of capital to be at any time borrowed by the company until the payments so to be made to the appellant should amount to the said purchase-money or sum of £6,000, the appellant, "in consideration of the said sum of £6,000 to be paid to him in manner thereinbefore stated," assigned

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the premises to the company. 1,000 fully paid-up shares were in the same month allotted to the appellant or his nominees.

Upon the execution of this deed, the company were let into possession. The company proved completely abortive. No shares were taken except the above 1,000 shares, and the shares necessary to qualify the directors; and the company, after the date of the assignment, never received any money upon the sale of shares, nor received any money by way of capital, nor borrowed any money.

564] *On the 15th of July, 1875, the company passed a resolution for a voluntary winding-up, which, by order dated the 27th of July, 1875, was continued subject to supervision.

The business premises were sold with the sanction of the court, and the proceeds paid into court. The appellant claimed a lien for his unpaid purchase-money, but Vice-Chancellor Malins decided against his claim, and made the order now appealed from.

Higgins, Q.C., and *Chester*, for the appellant: The cases as to what is sufficient to destroy a vendor's lien are collected in *Dart's Vendors and Purchasers*⁽¹⁾. We have performed our part of the contract, and assigned to the company: are we not to be paid at all? Suppose a person buys a brick-field for £6,000, to be paid by a percentage on all the bricks made, and then never makes a brick, surely the vendor must have some remedy. *Gore and Durant's Case*⁽²⁾ is very similar to the present case.

[BAGGALLAY, J.A.: There is no contract stated here to sell for £6,000, the consideration is "the sum of £6,000 to be paid as hereinafter mentioned."]

Whatever the form of the contract may be, the court will not hold that the company is entitled to keep the land without paying anything for it.

[BAGGALLAY, J.A., referred to *Dart's Vendors and Purchasers*⁽³⁾, as to a bond being given payable on contingencies which could not be calculated.

JAMES, L.J.: For what do you claim a lien? £6,000 to be paid in this way is a very different thing from £6,000 to be paid down.]

The original contract before the company was formed was £6,000, without any consideration as to the mode of payment. The cases of *Hughes v. Kearney*⁽⁴⁾, *Winter v.*

⁽¹⁾ Page 729.

⁽²⁾ Law Rep., 2 Eq., 349.

⁽³⁾ Page 736.

⁽⁴⁾ 1 Sch. & Lef., 132.

Lord Anson (¹), and *Matthew v. Bowler* (²), are against the lien being lost.

*[*Glasse*, Q.C., referred to *Earl Jersey v. Briton* [565 *Ferry Company* (³).]

Glasse, Q.C., and *Boome*, contra, were not called upon.

JAMES, L.J.: I am of opinion that the order of the Vice-Chancellor must be affirmed. The case of the appellant may be a hard one, but the nature of the transaction excludes vendor's lien. This is not the case of a simple agreement to sell for £6,000. No doubt the vendor got a higher price by agreeing to accept payment in the way he did, and taking his chance of capital being subscribed or capital being borrowed to an amount sufficient to pay him. He says in fact, "Half of the first capital moneys that come in to the extent of £6,000 is to be my purchase-money." No day for payment was named: he agreed to receive his purchase-money if and when capital should come in. He got for his property a charge upon and a right to the capital of the company to the extent of £6,000 when it came in. To my mind it is clear that he intended to rely on that fund for payment, and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property. I am, therefore, of opinion that the Vice-Chancellor came to a correct conclusion.

BAGGALLAY, J.A.: I am of the same opinion. In *Winter v. Lord Anson* (¹) the Lord Chancellor says: "As in this case there was no agreement for the extinguishment of the lien, and as, in my judgment, there is nothing in the transaction itself, as evidenced by the instruments, leading to a clear and manifest inference that such was the intention of the parties, I think it should be declared that the plaintiffs have a lien upon the estate in question for the residue of the purchase-money." Here, I think, it is evident that the party selling did not intend to rely on the security of the estate but on the funds of the company. *Gore and Durant's Case* (⁴) was *relied upon by the appellant, but with- [566 out saying whether I should be disposed to affirm that case on all points, I am of opinion that it is quite distinguishable from, and does not govern, the present. In that case the agreement was that the purchase-money should be paid partly in shares and partly in cash, as and when the company should receive any money in respect of shares subscribed

(¹) 3 Russ., 492.

(²) 6 Hare, 110.

(³) Law Rep., 2 Eq., 349.

(⁴) Law Rep., 7 Eq., 409.

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for over and above the first £1,000, and that if the shares and cash should not be paid within two years from the date of the agreement, the agreement should be void, and any shares and cash paid thereunder should be retained by the vendor as liquidated damages. Not only was the cash not paid within the two years, but the failure of the company made it impossible that it ever should be paid, and the Master of the Rolls had to do justice in the best way he could. Here there is no engagement to pay within a limited time.

BRETT, J.A.: I am of the same opinion, and for the same reasons as the Lord Justice James, and it would be useless for me to express those reasons in other terms.

Solicitors: *W. Neal; G. Blagden.*

See ante, p. 696 note.

[4 Chancery Division, 566.]

V.C.M., Dec. 3, 1876: C.A., Feb. 3, 1877.

In re IMPERIAL LAND COMPANY OF MARSEILLES.

Ex parte LARKING.

Company—Liability of Directors—Their Duty as Trustees—Fraud—Constructive Notice.

The promoters of a company, who were also directors, purchased land and sold it to the company at an increased price, retaining the difference for themselves. Part of the purchase-money was paid in debenture bonds. After the company had gone into liquidation, L., a director, but not one of the promoters, purchased 100 of the debentures at 25 per cent., for which he claimed to prove:

Held, by Malins, V.C., that L., as a director, could not plead ignorance of the purchase by which the shareholders were defrauded; that, having been in the position [567] of a trustee for the shareholders, he could not, by the purchase of debentures after the insolvency, make a profit out of a transaction which, as such trustee, he ought to have prevented, and that the claim must be disallowed.

On the claim being heard by the Court of Appeal the matter was compromised on the terms of the official liquidator paying to L. the amount which he actually paid for the debentures, with interest from the date of purchase.

THIS was an adjourned summons in the winding-up of the Imperial Land Company of Marseilles on a claim made by Mr. Larking to be admitted as a creditor for £2,000, in respect of 100 debenture bonds for £20 each, with interest thereon. Mr. Larking was appointed a director at the first board meeting of the company, on the 24th of February, 1866. At that meeting a contract dated the same day was sanctioned for the purchase from Mr. Masterman by the company of certain land at Marseilles for the sum of £3,325,000. Mr. Larking was not present at that meeting, but he was present at the following meeting held on the 8th

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of March, at which the minutes of the previous board meeting were read and confirmed. The debenture bonds held by Mr. Larking were part of £452,000 issued by the company on the 28th of March, 1866, to Mr. Masterman in pursuance of the contract and in part payment of the land so purchased from him. Mr. Larking was present at the board meeting of the 28th of March, and part of the debentures were signed by him as a director of the company. On the 5th of September, 1867, a resolution, proposed by the chairman and seconded by Mr. Larking was passed for winding up the company, and on the 16th of December, 1867, Mr. Larking resigned his appointment as a director.

On the 24th and 25th of March, 1868, Mr. Larking purchased, through the secretary of the company, 100 of the debenture bonds which were held by one of the directors for the sum of £587 10s., which was alleged to be their full market value.

A suit was afterwards instituted intituled the *Imperial Land Company of Marseilles v. Masterman and others*, to obtain a declaration that the contract with Masterman was a fraud upon the company, and void, and praying that Masterman might be ordered to deliver up for cancellation such of the debentures issued under the contract as were in his possession, and to indemnify the company *against [568 such as he had parted with. It appeared in the suit that out of the purchase-money of £3,325,000, which under the contract was to be paid to Masterman, only £2,665,000 was to be paid to the real owners of the property, and the remaining sum of £660,000 was to be received in various proportions by the promoters of the company. Before the suit was brought to a hearing a compromise was entered into under which a large sum of money was paid back by several of the defendants to the liquidators.

In January, 1874, Mr. Larking's summons first came on for hearing, when his proof in respect of the 100 debentures was admitted subject to the equities, if any, which affected them in his hands, the validity of the original issue of which was impeached in the suit. The compromise, however, having been so effected, the summons came on to be heard in order to be finally disposed of.

Mr. Larking, in the course of his examination and cross-examination, stated that he was not a director of the company at the time the contract was entered into, and was not aware of the fact that the whole of the purchase-money was not to be paid to the real owners of the property. He was not consulted by Mr. Vallance (the solicitor of the company)

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about the price to be paid for the land, and was ignorant of the purchase until he became a director. He had asked for the contract but could not get it. He had been to Marseilles to inspect the property, and had been told while there that the company was paying a high price for the lands. He never heard from the directors or other persons that a part of the purchase-money was paid to persons other than the vendors, but he had heard so since. While he was a director he heard a vague report that money had been paid to the promoters, but he had no proof of it, and could not say from whom he had heard it. That was about twelve months after the formation of the company. He did not investigate the matter, but said he would watch Albert Grant, to see whether there was any truth in the story, and if he did, he would leave the company. He also stated that he had resigned the directorship on the 16th of December, 1867, and had purchased the debentures on the 24th and 25th of March, 1868, but he did not know at the time he purchased the debentures that the company was in liquidation. If he had known it, he would not have purchased them.

569] *The summons came on for hearing before Vice-Chancellor Malins on the 2d of December, 1876.

J. Pearson, Q.C., and *Romer*, in support of the summons: These debenture bonds were purchased by Mr. Larking in the market at the price of the day, and he has a clear right to be paid the full value of them. The court has already decided, in *Ex parte Colborne and Strawbridge* ⁽¹⁾, that these bonds were promissory notes or negotiable instruments, and amounted to contracts to pay any one who might happen to be the bearer. Under that decision other debenture holders have received the value of their bonds. Mr. Larking was not a director of the company when the contract for the purchase of the land at Marseilles was entered into, though he afterwards became a director. He states that he was not aware of the terms of the purchase, and that he was unable to obtain information respecting the contract, although he applied for it. He was, therefore, a purchaser for value without notice of any equities which existed between the vendors and the company. The suit of the *Imperial Land Company of Marseilles v. Masterman* was for the purpose of determining the validity of the original contract for buying the land, the purchase-money for which was partly paid with these debentures; but that suit was compromised, and the contract stands. The company, therefore, have got the land, but they virtually refuse to

(1) Law Rep., 11 Eq., 478.

pay the purchase-money. The court cannot on this summons investigate the whole proceedings with regard to the purchase of the land, to say whether the contract was tainted or affected with any equities. The debentures were purchased by Mr. Larking without any knowledge on his part of any improper transactions. The sale is confirmed, and cannot now be impeached, and certainly not in these proceedings, when the parties said to be implicated are not before the court.

Glasse, Q.C., Higgins, Q.C., and Wingfield, for the liquidators: This is a case of a director knowingly being party to the issue of debentures which were fraudulently and improperly issued. That *he must have known it is [570 evident from the fact that he was a director from the first to the last, and had every means of knowing all the transactions of the company, and if he did not know them, he is affected with notice. Moreover, he signed some of the debentures himself when they were issued. He admits that he knew the property purchased from Masterman belonged to several persons at Marseilles, who were the real owners of it. He went himself to Marseilles to inspect the land. While there he was under the impression that the owners were selling direct to the company, therefore he admits he knew that Masterman was not the real owner of the property, and it was his duty to ascertain the true nature of the transaction. He says he heard that money had been paid to promoters. That was twelve months after the formation of the company. If he had inspected the contract, as it was his duty to do, he would have ascertained that the purchase-money was "salted," or increased beyond the sum paid to the vendors for the benefit of the promoters or some of them. His statement that he resigned his directorship is not true, since the resolution to wind up the company was passed while he was a director, and that resolution was actually seconded by Mr. Larking himself. These debentures were purchased by him on the 24th and 25th of March, 1868, which was after the company was in liquidation, and when he knew it was being wound up. It has been decided that a director does not escape the liability of his conduct after the winding up, but is liable for what he has done in the management of the funds. It was said by Lord Romilly in *Land Credit Company of Ireland v. Lord Fermoy* ⁽¹⁾: "Directors are, so far as regards the employment of the funds of the company, trustees for the shareholders, and are answerable to their *cestuis que trust* for the due employment of the

⁽¹⁾ Law Rep., 8 Eq., 7, 11.

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funds intrusted to them." A director who retires still retains the liability of a director for certain purposes, as we find in the case of the *Madrid Bank v. Bayley* ⁽¹⁾. And it was held in the *Joint Stock Discount Company v. Brown* ⁽²⁾ that directors, though not present at all the meetings, are liable for a breach of trust committed by their co-directors.

571] *In fact, therefore, Mr. Larking purchased what he knew to be worthless property on the chance of getting 75 per cent. upon the transaction. It was a mere speculation, and the purchase was not made in the open market, but through the secretary of the company. It is impossible that Mr. Larking should have gone to Marseilles and seen the land and talked about it on the spot, without knowing that the company had been cheated. He was in an exceptionally advantageous position to know all about it, and if he had made those inquiries which it was his duty to make, he must have discovered that there was no less than £665,000 paid without any consideration whatever, and the £452,000 debentures are included in that £665,000. The decision in *Ex parte Colborne and Strawbridge* ⁽³⁾ was to the effect that the holders for value of the debentures without notice were entitled to stand as creditors of the company; but Mr. Larking was not a holder of the debentures without notice, for he was a party to issuing these debentures. If he did not know for what they were issued he ought to have known it, and it was his duty to have inquired. There was not a shilling of value given for the debentures, for they were issued to pay the £665,000 over and above the actual purchase-money. The debentures are, therefore, worthless in his hands, and he cannot sustain this claim. The debentures are, in his hands, mere *choses in action*, notwithstanding the form being "payable to bearer;" he is not a holder for value without notice, nor is he a holder for full value; he bought them under circumstances which were quite enough to put him on inquiry. He knew the circumstances under which the debentures were issued, and ought to have prevented their issue. He bought the bonds after the company was in liquidation, and in this the case resembles the law of bankruptcy, where it has been held that a man cannot buy a debt of a bankrupt after the bankruptcy except under very special circumstances. The case of *In re Bowles* ⁽⁴⁾ is an authority upon that point. The *onus* is upon the bankrupt to show that the notes were in the hands of *bona fide* holders at the time of the bankruptcy. Under

⁽¹⁾ Law Rep., 2 Q. B., 87.

⁽²⁾ Law Rep., 8 Eq., 381.

⁽³⁾ Law Rep., 11 Eq., 478.

⁽⁴⁾ Buck's Rep., 490.

these circumstances, therefore, the claim ought to be disallowed with costs.

**Romer*, in reply: The mistake made by the defendants is in saying that these debentures were given in payment of the £665,000, when in fact they were issued as part payment of the whole purchase-money for the land. They have no right to say that these debentures represented that portion of the purchase-money which was not paid to the vendors. Consequently a great portion of these bonds represent the money really paid for the purchase. They cannot impeach these bonds without impeaching the whole transaction; they cannot cancel the bonds as to part only. The other parties to the transaction are not here, and they have agreed not to undo the transaction as a whole. But they keep to the purchase, and try to get back part of the purchase-money from these debenture holders. The course open to the defendants is to impeach the whole purchase, and ask to return the property bought and to have the debentures delivered up. They have already got back the amount of salting over and above the actual purchase-money, and the court cannot take an account now to ascertain what part of the purchase-money was paid by the debentures. The compromise of the suit was on the footing that the outstanding debentures would rank against the company. It is said there was a fraud, but if Larking was not a director at the time it was carried out he cannot be held responsible for it. Where there is a concealed fraud, and a director shows that he, personally, had no actual notice of it, he cannot be held liable, nor can he be affected with full notice of the fraud, because he might, if he had taken certain proceedings, possibly have discovered the existence of it. Larking did not attend the meeting at which the contract was resolved upon, though he attended the subsequent meeting when the minutes of the previous meeting were read and confirmed, but that does not make him liable for what was done when he was not present. The mere fact that part of the purchase-money was to be paid to Masterman was not sufficient to make him suspect the nature of the transaction. If he had been a stranger to the company he would have had a right to purchase these debentures, and the fact of being a director does not take away that right. No one ever heard of a director not being permitted to purchase shares in the company. Larking is, *therefore, entitled to prove for [572 the whole amount of his claim in respect of these debentures. [573

MALINS, V.C.: Mr. Larking, in this case, claims to prove against the company for 100 promissory notes or debentures

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of £20 each. Those debentures he bought on the 24th and 25th of March, 1868, and he states in his examination that he gave for them £587; that is, he bought them at nearly, not quite, 75 per cent. discount. The question is whether he can be permitted to stand as a creditor against the company for anything whatever upon those debentures, and, if he can so stand as a creditor at all, whether he can stand as such for more than he actually paid for them.

In order to prove that he is not entitled to stand as a creditor at all, it is stated, and admitted, that this company having been formed in February, 1866, he was appointed a director at the very first meeting which was held, namely, the 24th of February in that year. He was appointed, and is named in the resolution as one of the first directors. He did not, it seems, attend that meeting, but he did attend the next meeting, which was held on the 8th of March, 1866. At the meeting of the 24th of February a contract was entered into to purchase the lands upon which the operations of this company were to be carried on, of a Mr. Masterman, for the sum of £3,325,000. That was the contract entered into on the 24th of February. The resolution to enter into it was read and confirmed at a meeting, which Mr. Larking did attend, on the 8th of March in the same year. It turns out that that contract for £3,325,000 was what is called, and what I understand, as "salted." That is, the directors, who were trustees on behalf of the company, who were bound to act with all that integrity and fair dealing towards the shareholders with which trustees are bound to act with regard to their *cestuis que trust*, thought themselves at liberty to put into their pockets a sum of £660,000, which has been proved to be the amount, being the difference between what they were to give for the property and that which they felt at liberty to charge their shareholders with. Part of the arrangement for carrying this into effect was by means of certain debentures or promissory notes, which were issued in that very 574] month of March, 1866. They are *promissory notes which have been the subject of adjudication by myself in *Ex parte Colborne and Strawbridge* (1), and those promissory notes or debentures are in the common form. They run thus: "The Imperial Land Company of Marseilles, Limited, hereby bind themselves and their successors to pay to bearer the principal sum of £20 on the 31st of March, 1872, such payment to be made at the National Bank," and so forth. I decided in that case that they were in point of fact promissory notes, and that every *bona fide*

(1) Law Rep., 11 Eq., 478.

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holder of those notes was entitled to stand as a creditor against the company. Mr. Larking says he comes within that definition, and that he has as much right to prove against the company as if he had never been a director. He was a director from the first meeting of the 24th of February, 1866, according to his statement, down to the 16th of December, 1867, when he says he resigned. But it happens that, before the date at which he says he resigned, the company had gone into voluntary liquidation; for the resolution, I find, was passed on the 22d of August, 1867, and confirmed at the following meeting, on the 5th of September, 1867; and it is a very remarkable thing that the resolution proposed by the chairman was seconded by Mr. Larking on the 5th of September, 1867. He bought these debentures on the 24th and 25th of March, 1868, and he says, in his cross-examination, that he did not know the company was then in liquidation, and if he had, he should not have purchased them. So that, being a director who was party to moving or seconding a resolution to wind up the company voluntarily in the month of September, 1867, and buying these debentures in the month of March, 1868, he swears that he did not then know that the company was in liquidation. It is said that was a mere mistake of his. I assume it was; I do not propose to treat Mr. Larking as a person who intended to commit perjury, or as one who intended to commit, and has committed, a fraud. But it shows a want of care, a want of business habits, and a want of due appreciation of the position he had occupied, which I am very sorry to see.

Now, if every one of these debenture holders had paid £20, and the company was made to acknowledge itself indebted in that amount, something, I think, might have been said for it. But it *turns out that all these debentures, as part of the fraudulent scheme to cheat the shareholders, were issued to Mr. Masterman, not for value, but as part of that salting price of £660,000 of which the company was cheated by the conduct of their directors. Mr. Larking, as a director, had contributed by his conduct in leading these unfortunate shareholders into the disasters which have befallen them; and I am sorry to say, by the experience I have had of this company, now extending over very nearly eight years, that the money has been painfully extracted from many small traders, shopkeepers in Ireland and Great Britain, for the purpose of paying the debts of the company. Mr. Larking, who bought these debentures at 25 per cent. after the company had got into difficulties,

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after he knew it was in a state of disaster and ruin, raises the decent contention that he is at liberty to prove against these unfortunate shareholders for the full amount of the debentures. When the application came before me at the beginning of November, as soon as I saw the nature of the case I made a suggestion which ought to have been acted upon, namely, that under the circumstances (I did not know them all then), seeing he had been a director of the company, and knowing perfectly well that no man could have been a director of this company without having much to answer for, I suggested that both parties should concur in allowing Mr. Larking to stand as a creditor for the amount he had actually paid for these debentures, with interest; and I cannot but express my surprise that that offer which was made by the official liquidator, an offer which would meet every view of the justice of the case, which would have indemnified him against loss, and have given him a good investment at 5 per cent., was not accepted. I say I am surprised that a gentleman in the position of Mr. Larking should not have been satisfied with such an offer as that, but should have argued that these transactions, which have ended in the disaster into which he has led these shareholders, can be upheld, and that by buying up the debentures he is to turn them into a profit of 75 per cent.

What, then, is the position of Mr. Larking? The only question I have to decide here is, whether, under all the circumstances of the case, as against these shareholders, who were under his protection, and whom he has so lamentably 576] failed to protect, he can *extract from their pockets a profit of 75 per cent. upon these transactions. That he ought not to have made the attempt, I most emphatically express my opinion; that he cannot succeed in it, I equally emphatically express my opinion.

Then it is said that he did not know of this salting, and did not know that the money had been given to these fraudulent directors; but I must attribute to him as a director all the knowledge which by reasonable diligence he would have acquired, and by reasonable diligence he might have found out why it was that £3,325,000 was given for this property, which to the first purchasers had only cost £2,665,000.

He states in his deposition—"I asked for the contract, and could not get it." But a director who fails in his duty in not obtaining the information which reasonable diligence would furnish him with, cannot turn round and avail himself of his own want of care, prudence, and business habits, to obtain a profit to the disadvantage of those who are under

his protection. He then then stated, "I do not know as a matter of fact to whom the bonds I signed were given. I was not consulted by Mr. Vallance about the price to be paid for this property. I was ignorant of the purchase until I became a director" (that was the very second meeting of the directors). "I was told at Marseilles you are paying a high price for it. I never heard from the directors or other persons that a great part of the purchase-money was paid to persons other than the vendors, but I have heard so since. While I was a director of the company I heard a vague report" (observe this is a man who undertook to protect a large body of shareholders) "that money had been paid to the promoters." He heard a vague report. Was it not his duty to investigate the fact when he heard such report? Then this is his statement: "but I had no proof of it, and I cannot say from whom I heard it. This was about twelve months after the promotion of the company" (that is, therefore, in the early part of 1867), "and I don't think earlier than that. I did not investigate the matter, but said I will watch Albert Grant to see whether there is any truth in the story, and if I do, I will leave the company." He never investigated it, he never found it out, and he never left the company, but he continued to be a director to the very last day of its existence. This is the man who comes forward and gravely *argues this claim before me, having [577 been guilty of a gross neglect of duties, to say nothing more, those duties which he owed the shareholders, many of whom had committed their all to the affairs of this company. He totally neglects his duty towards them, he allows them to be defrauded, because he never investigates the facts which he ought to have done; he totally fails in the performance of every part of his duty towards them, and when he knows that the company has fallen into ruin and disaster, that no shareholder has ever got a penny by his investment, and there is barely a possibility he ever can get a penny by it, that in all probability he will have to contribute every farthing for which he is liable, to pay the debts of the company—he thinks it then decent, at a time when he knew it was being wound up, to go and buy these debentures at 75 per cent. discount, and then comes here and contends that he is entitled to prove for the full value, and not for what he gave for them. I must attribute to him the knowledge which he ought to have acquired, and, therefore, I must attribute to him the knowledge that these debentures were corruptly and improperly issued. It is perfectly immaterial whether the whole of that salting money

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was got back or not. He was bound to know that these debentures were fraudulently and improperly issued. He says he would not have purchased them if he had known that the company was in liquidation, which it now turns out he did perfectly well know, because six months before he bought them he had actually been a party to seconding a resolution that the company should go into liquidation. Therefore, upon the ground of his knowledge that the debentures were improperly issued, and his knowledge that the company was in liquidation and insolvent when he bought them, on every principle he is deprived, in my opinion, of the right, if not to recover anything, at all events to recover more than the price he actually paid for them. He says that he ceased to be a director of the company upon his resignation on the 16th of December, 1867; but he could not divest himself of the character of a director at that time. The company was being wound up, he had incurred all the consequences of being a director before the 16th of December, 1867, and had been guilty of all these neglects of duty to which I have referred. He had been guilty of gross in-578] justice towards his constituents, the shareholders, *by failing in everything that he ought to have done to protect them against the misfortunes which have befallen them. Therefore I say it is neither decent nor proper, nor according to law, in my view, that he can traffic in these debentures, and make a profit of 75 per cent. by them.

There is another principle which appears to me conclusive against him, which has not been much argued by counsel; but it is a settled rule of this court that no trustee who buys up an incumbrance upon an estate of which he is trustee can ever against the trust estate make a profit, and never can recover against the *cestui que trust* more than the price he gave for it. If a man who is a trustee of an estate buys up a mortgage upon it at 20 per cent., he can only get the 20 per cent., with interest upon what he paid. Here is a man, a director of a company, who is a trustee. He has all the obligations of a trustee to perform. Here is a case in which he knows the company is insolvent at the time, that it had actually come to a disastrous end when he bought these debentures, and on that principle alone he cannot make a profit by his trusteeship. To refer to what Mr. Romer said with regard to what might happen when a company is in a flourishing state, no doubt when a company is flourishing or solvent, any director may take the debentures of the company or do anything else; but when a company has so ended in disaster as this has, he cannot turn his

office into profit at the expense of those whose interests he was bound to protect, but which he has entirely failed to protect. Therefore, considering that the company had become insolvent when he bought the debentures, upon that principle also I am clearly of opinion that he cannot be allowed to recover the full amount due upon the debentures, but he can only recover that, if anything, which he paid for them.

As it appears that this is an insolvent company, I think the Rules in Bankruptcy are also applicable to this case. Mr. Larking knew perfectly well, or was bound to know, that these debentures had been improperly issued, and being improperly issued during the time of his directorship, he bought them. He is not, therefore, a purchaser for value without notice; he takes them with all the knowledge which his position as a director gave him, and was bound not to neglect his duty. He states, I think, in his *cross- [579 examination, that he did not make the necessary inquiries which would have led him to the conclusion that he had been a party to any improper issue of these debentures, but having been improperly issued he cannot make a profit of them after the company has got into insolvency.

Upon every ground, therefore, I come to the conclusion that he cannot be allowed to recover more than the amount which he paid for them, with interest thereon. I do not know whether the liquidators desire to withdraw the offer they made before, of allowing him to stand as a creditor for the amount paid.

The liquidators expressed their willingness to adhere to the offer already made.

MALINS, V.C.: Will Mr. Larking accept it?

Romer said, in the absence of his leader, he could not give an answer to the proposal.

MALINS, V.C.: You may consider it. If you accept the offer there is an end of the matter, but if you do not; I shall have the refusal inserted in the order: "The liquidators being willing to allow Mr. Larking to stand as a creditor for the price which he paid for these bonds, namely, £587, with interest thereon from the date of the purchase, and he having declined that offer, disallow the claim altogether." I will allow Mr. Larking fourteen days to consider the matter. If the offer is accepted, Mr. Larking will pay his own costs only, and the liquidator must take his costs out of the estate. If the offer is refused, then the claim is dismissed with costs.

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On a subsequent day it was stated that Mr. Larking declined the offer of the liquidators.

Mr. Larking appealed from this decision.

The appeal was heard on the 3d of February, 1877, before James, L.J., Brett, J.A., and Amphlett, J.A.

J. Pearson, Q.C., and *Romer*, for the appellant.

580] **Glasse*, Q.C., *Higgins*, Q.C., and *Wingfield*, for the liquidators.

Before the arguments were concluded the liquidators renewed their offer to pay the appellant the amount of his purchase-money, with interest at £5 per cent. from the date of his purchase, which the appellant accepted on the understanding that the money was to be paid in full, and that he was not merely to stand as a creditor for that sum. The case was therefore compromised on those terms. It was also agreed that there should be no costs on either side, either in the court below or on the appeal.

JAMES, L.J.: I wish to add that I entirely assent to the Vice-Chancellor's observations to the effect that, where a person sustains a fiduciary character, it is not the practice of the court to allow him to make a profit by the transaction.

AMPHLETT, J.A.: I quite agree with what the Lord Justice has said respecting persons in a fiduciary position.

Solicitor for appellant: *G. M. Clements*.

Solicitors for liquidators: *G. S. & H. Brandon*.

See *ante*, p. 124 note.

Both the letter and spirit of the law forbid that directors of schools shall in anywise, whether directly or indirectly, openly or covertly, become interested in demands or claims originating while they are directors, to be satisfied by payment from the funds of their district.

Where orders were drawn by two school directors in favor of the third, one for labor in repairing a school house, and the other for wood furnished the school, of which payment was made by the township treasurer, it was held, that if the services were performed and the wood furnished while the person receiving the order was director, the school district was entitled to recover the money so paid, in an action against him, but if before he was elected, it was not.

Where a school director is shown engaged in a transaction which *prima facie* he is prohibited from engaging

in, as he is in taking orders to himself for wood furnished and labor performed, the burthen is then on him to show that though the orders are then executed, they are not, as otherwise would be the presumption, a settlement of transactions just completed, but in settlement of transactions before he became director: *School Directors v. Parks*, 85 Ills., 338.

Where, upon the petition of an administrator, the land of his intestate is sold for assets by a commissioner appointed by the court, and the administrator purchases for his own use and benefit, the heirs and other persons interested in the disposition of the realty have their election to treat the sale as a nullity, or to hold the administrator responsible for the actual value of the land.

To the general rule that an administrator is not permitted to purchase at his own sale, there are the following exceptions: 1. Where the trustee has

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a personal interest in the property, he may, if necessary, bid it in to protect that interest. But even then, it is proper, if not indispensable, that his bidding should be sanctioned by the previous permission or subsequent confirmation by the court, upon a full disclosure of all the facts. 2. Where the *cestui que trusts* consent to the purchase or ratify it with a full knowledge of all the facts: *Froneburgher v. Lewis*, 79 N. C., 426, and numerous cases cited.

The mere fact that the relation of guardian and ward has existed, will not preclude the making of contracts between the two after the guardianship has ceased and the accounts fully and fairly settled. After the fiduciary relation has terminated, and the influences which that relation would necessarily create have ceased to exist, the parties may make contracts which, if fairly and honestly made, based upon an adequate consideration, will be sustained.

Where a ward shortly after arriving at age was induced by her guardian, and before settlement of his accounts, to convey to him her real estate for the expressed consideration of \$1,300, he paying but \$600, and representing that indebtedness amounting to \$700 was existing against the land, when such was not the case, it was held that as the conveyance was made upon a misapprehension of facts induced by the guardian, the transaction could not be sanctioned in equity.

Advances made by a guardian to his

ward cannot be regarded as a charge upon the ward's land, until an account is presented to the county court and approved.

Where a guardian procures his ward, after coming to her majority, to convey to him her land, even for an adequate price as expressed in the deed, but paying, in fact, not quite half that sum, he making the ward believe there were charges against the land for the amount not paid, upon bill filed by the ward to set aside the conveyance, the guardian could not have allowed to him the sums due him for advances made to the ward, when his account has never been presented to and approved by the county court.

A party seeking relief in a court of equity must do equity. Therefore, if a ward seeks to avoid a conveyance made by him to his guardian after his majority, on the ground of imposition and misrepresentation of the facts, he will be required to return the whole of the purchase-money paid to him, or the land should be ordered to repay the same, as a condition upon which the sale should be set aside: *Wiekiser v. Cook*, 85 Ills., 68.

Where several owners of land conspired to form a corporation, to apparently subscribe a considerable sum to the stock thereof and to sell their real estate to the corporation at a large profit, they are liable to *bona fide* subscribers to account for the profits so made by them: *Getty v. Devlin*, 70 N. Y., 504, affirming 9 Hun, 603.

[4 Chancery Division, 586.]

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[1876 F. 111.]

Practice—"Counter claim" between co-defendants—Notice to co-defendant by delivery of Pleading—Judicature Act, 1873, s. 24, subs. 3—Rules of Court, 1875, Order XVI, r. 17; Order XXII, r. 5.

Questions between co-defendants may be raised by a pleading which states both a defence as against the plaintiff and a claim against a co-defendant, but such pleading is not a counter claim under Order XXII, rule 5, and should not be so intitled.

Delivery of such pleading to the co-defendant is sufficient notice under Order XVI, rule 17.

Shephard v. Beane (1) not followed.

(1) 2 Ch. D., 228.

THIS was an action for an injunction to restrain one Booth and his five tenants from permitting foul water or sewage to flow from five houses belonging to Booth at Harlesden Green into a watercourse claimed by the plaintiff.

Clark, one of the five tenants, delivered to the plaintiff, and also to his co-defendant Booth, a defence and counter claim, entitled "*Furness v. Booth, and Clark v. Booth* by counter claim," denying the plaintiff's title to the watercourse and the fact of the nuisance, and making a "counter claim" against Booth, averring a covenant on his part for quiet enjoyment, and claiming indemnity from him against any damages and costs which he, Clark, might be ordered to pay to the plaintiffs.

Maidlow, for the plaintiff, now moved to strike out so much of the defence and counter claim as consisted of the counter claim, and that Clark might be ordered to pay the costs thereby occasioned.

W. B. Heath, for the defendant Clark: I submit that the proper mode of raising the question between me and my co-defendant is by "counter claim," under rules of court, 1875, Order XXII, rule 5.

Shephard v. Beane(¹), before Vice-Chancellor Hall, ex-587] pressly *lays down that questions between co-defendants should be raised by "counter claim," and delivery of it to the co-defendants.

[*Cookson*, Q.C., as *amicus curiæ*: In *Warner v. Twining*(²) your Lordship held, on the contrary, that no counter claim could be set up which did not seek relief against the plaintiff.]

At all events, this "counter claim" can only be wrong in form. We have, in substance, claimed by our pleading relief against our co-defendant, and the delivery of the counter claim may be treated as service of notice of our claim under the Judicature Act, 1873, s. 24, subs. 3, which enables the court to grant to any defendant the relief claimed by his pleading against the plaintiff or "against any other person, whether already a party or not, who shall have been duly served with notice in writing of such claim."

JESSEL, M.R.: A pleading which asks no cross relief against a plaintiff either alone or with some other person is not a "counter claim," and, therefore, does not fall within Order XXII, rule 5. Under the Judicature Act, 1873, s. 24, subs. 3, the relief sought by the defendant Clark against his co-defendant required to be pleaded, and it was necessary to give notice of the pleading to the co-defendant

(¹) 2 Ch. D., 223.

(²) 24 W. R., 536.

under the act, and Order XVI, rule 17. I think delivery of the pleading to a person already a defendant is sufficient notice under that order. I shall, therefore, only order the word "counter claim" to be struck out, and treat the delivery of this pleading as a notice to the co-defendant Booth. With regard to the case of *Shephard v. Beane*(¹), I do not think the Vice-Chancellor intended to lay down that a "counter claim" is the right form of such a pleading as between co-defendants. He does not, in fact, use the word in his decision, and it seems to me, therefore, that the head-note of the case is incorrect in so laying it down. However, it stands as a reported decision in your favor, Mr. Heath, and therefore I shall not make you bear the costs of this application.

Solicitors for plaintiffs: *Morris, Stone, Townson & Morris*.

Solicitors for defendant Clark: *Carr, Fulton & Carr*.

(¹) 2 Ch. D., 223.

See 12 Eng. Rep., 323 note; Clarke's Chy., 15 (marg. p.), and Moak's note, ed. 1869, p. 8.

A party defendant cannot, in some cases, be *compelled* by a co-defendant to settle in the action, to which they are both defendants, a controversy existing between them which does not spring out of the adjustment between them of the joint claim against them made by the plaintiff in the action: *Fink v. Allen*, 36 N. Y. Superior Court Rep., 350.

In many cases the rights of co-defendants may be best, and perhaps necessarily, adjusted by the co-defendant having the equity commencing a suit against all the necessary parties to enforce it: Moak's note, Clarke's Chy., 15 marg. p. (p. 8, ed. 1869), and cases cited; *Fink v. Allen*, 36 N. Y. Superior Court R., 350.

Though in many cases one co-defendant may litigate with a co-defendant and have their respective rights determined, and in some cases will be required

so to do or be precluded: *Newman v. Dickson*, 1 Abb. N. C., 307; *Corcoran v. Chesapeake*, etc., 94 U. S. Rep., 741.

The present Code of New York provides (§ 521) that, "Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer, and must, at least ten days before the trial, serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination. The controversy between the defendants shall not delay a judgment, to which the plaintiff is entitled, unless the court otherwise direct."

See also Code, § 1204; Moak's Van Sant. Plead., 237, 357, 591, 610, 635; *Getty v. Devlin*, 70 N. Y., 504, affirming 9 Hun, 603; S. C., 54 N. Y., 403; *Stickney v. Blair*, 50 Barb., 341.

As to the right of one co-defendant to notice of a proceeding by another, see Moak's Van Sant. Pl., 357.

[4 Chancery Division, 600.]

M.R., Feb. 3, 1877.

600]

**In re* KERR'S TRUSTS.

Power of Appointment—Testamentary Appointment of Fund in Joint Tenancy—Excessive Execution—"Children"—Illegitimate Children—Intention—Reading Tenancy in Common—Gift in Default of Appointment—No Hotchpot Clause.

K. by his will gave a fund upon trust for such of the "children" of his daughter M. (who was then married) as she should by will appoint, and, in default of appointment, for her children equally. The will contained no hotchpot clause. M. had several children, some of whom were illegitimate, having been born before her marriage. By her will she appointed the fund to her "children E. and C., their executors, administrators, and assigns, for their own use and benefit." E. was one of the illegitimate and C. one of the legitimate children:

Held, reading M.'s testamentary appointment as indicating an intention to appoint the fund in moieties, that one moiety passed to C. under the appointment, and that the other moiety, E. not being an object of the power, was divisible among all the legitimate children, as in default of appointment.

Humphrey v. Tayleur ⁽¹⁾ and *Alexander v. Alexander* ⁽²⁾ discussed.

DAVID KERR, who died on the 28th of March, 1863, by his will, dated the 16th of June, 1862, gave his residuary estate to trustees, to stand possessed of one-third part thereof, after the respective deceases of his daughter Maria Charlotte Young and her husband David James Young, upon trust for all and every such one or more exclusively of the other or others of the children of his said daughter Maria Charlotte Young or the issue (born in the lifetime of his said daughter) of any such child or children as the survivor of them the said David James Young and Maria Charlotte Young should by will appoint, and in default of such appointment, and so far as any such, if incomplete, should not extend, in trust for all and every the child and children of his said daughter Maria Charlotte Young, in equal shares.

The will contained no hotchpot clause.

Mrs. Young survived her husband, by whom she had several children, some of them being illegitimate, having been born before her marriage, and by her will, dated the 24th of March, 1873, she, "in pursuance and in exercise of the power 601] contained in the will *of her father, David Kerr, appointed all her right, title, and interest under the said will of, in, and to the estate of her said father unto her children Charlotte Elizabeth (then the wife of William Nassau Morton) and Catharine Young, their administrators and assigns, To hold the same unto and to the use of the said Charlotte

⁽¹⁾ Amb., 136.

⁽²⁾ 2 Ves. Sen., 640.

Elizabeth Morton and Catherine Young for their own absolute use and benefit."

The testatrix, Mrs. Young, died on the 29th of March, 1873, leaving her said two daughters, Charlotte Elizabeth Morton and Catherine Young, her surviving.

Charlotte Elizabeth Morton was one of Mrs. Young's illegitimate children. Catherine Young was the eldest legitimate child.

The trustees of the will of David Kerr having paid into court, under the Trustee Relief Act, the trust fund in their hands representing the settled one-third share of their testator's residuary estate, a petition was now presented by Catherine Young for the payment out to her of the fund, on the ground that inasmuch as her mother's appointment was in terms to her, the petitioner, and her reputed sister Charlotte Elizabeth Morton, as joint tenants, and had failed as to Charlotte Elizabeth Morton by reason of her illegitimacy, she, the petitioner, had become entitled to the whole of the appointed fund.

Oswald, for the petitioner: I submit that the appointment created simply a joint tenancy, with all its incidents, including the *jus accrescendi*. It has been long settled that if an estate be limited to two persons jointly, the one being capable of taking and the other not, he who is capable takes the whole: *Humphrey v. Tayleur* ⁽¹⁾.

[JESSEL, M.R.: Has the rule ever been applied to appointments of personal estate under powers?]

In *Alexander v. Alexander* ⁽²⁾, where a power was given to a wife to appoint a fund by will among her children, and the wife made an appointment by will "to her son Francis and his wife and children," it was held by Sir Thomas Clarke, M.R., that Francis, being the only appointee capable of taking, took the whole.

*[*Nugent*, contra: That decision is disapproved [602 of by Lord St. Leonards in Sugden's Powers ⁽³⁾, where he observes that the reasoning of the Master of the Rolls was "very artificial" and "not satisfactory."]

[JESSEL, M.R.: *Alexander v. Alexander* ⁽²⁾ is not quite in point. There were various questions in that case, but the actual decision was, that under the particular circumstances, the son was entitled to the whole of the appointed fund. Sir Thomas Clarke read the will as if the words were, "to my son Francis and his wife and children, if they shall by law be capable." In saying that the reasoning was "very artificial" and "not satisfactory," Lord St. Leon-

⁽¹⁾ Amb., 136.

⁽²⁾ 2 Ves. Sen., 640.

⁽³⁾ 8th ed., pp. 504, 505.

ards means to say it was unsound reasoning, and I agree with him. The Master of the Rolls had no right to put into the will the words he did. The decision in effect was, that although there was no possibility of ascertaining what shares the appointees were intended to take, yet the one object of the power took the whole. That decision has been overruled by later authorities.]

Oswald: But Sir Thomas Clarke expressly follows the principle laid down in *Humphrey v. Tayleur* ⁽¹⁾.

[JESSEL, M.R.: What he says in *Alexander v. Alexander* is a mere *dictum*, and it is difficult to support a *dictum* when the decision is gone. With great deference to Sir Thomas Clarke, I do not see what *Humphrey v. Tayleur* had to do with the case before him. *Humphrey v. Tayleur* does not appear to have been decided on general law, but on the words of the codicil. Lord Hardwicke treats the codicil as if it had the effect of erasing the name of one of the original appointees.]

I ask your Lordship to read this will in the same way, treating it as if the testatrix had inserted the name of the illegitimate daughter by mistake. The testatrix, no doubt, thought that when she had a power of appointment among her "children," it included her illegitimate children. It is clear, however, that only legitimate children are objects of 603] the power, *Hill v. Crook* ⁽²⁾, since *there are no grounds here for including illegitimate children, such as existed in *Lepine v. Bean* ⁽³⁾.

At all events, the appointment is good so far as regards the petitioner, and I submit that under it she is entitled in any case to at least one half of the fund: *Short v. Smith* ⁽⁴⁾; *Eales v. Drake* ⁽⁵⁾.

Nugent, for two of the younger legitimate children claiming under the original gift over in default of appointment: With regard to the latter part of the petitioner's argument, the precise share which she is to take cannot be defined from the terms of the appointment, assuming there is a joint tenancy; and the rule is, that if the appointment be to persons as a class, some of whom are and some are not objects, and if it is impossible to define how much of the appointment falls within the power and how much without it, the whole appointment fails: *In re Brown's Trusts* ⁽⁶⁾, which is a case very similar to this. *Alexander v. Alexan-*

⁽¹⁾ Amb., 136.

⁽²⁾ Law Rep., 6 H. L., 265.

⁽³⁾ Law Rep., 10 Eq., 160.

⁽⁴⁾ 4 East, 419.

⁽⁵⁾ 1 Ch. D., 217.

⁽⁶⁾ Law Rep., 1 Eq., 74.

der ⁽¹⁾ is there referred to, but it is difficult to see how the two cases can stand together.

If your Lordship should be of opinion that the appointment is only partially and not altogether void, then the question is, how much of the fund has been properly appointed? Now when the testatrix gives a fund to two persons, her most probable intention is that it shall be divided between them, and, in the absence of any indication to the contrary, in equal shares. I ask your Lordship, therefore, to read the will as if the testatrix had directed an equal division, so as to bring the case within the principle of *Sadler v. Pratt* ⁽²⁾, the appointment being held void only as to the excess. The petitioner will thus take one half of the fund under the appointment, and the other half will go as in default of appointment.

Oswald, in reply: If the appointment is read as an appointment to an object of the power and a stranger in equal shares, then it is clear that, the *two gifts being separate, the gift to the stranger alone fails: Farwell on Powers ⁽³⁾; *Bruce v. Bruce* ⁽⁴⁾.

Macnaghten, for the trustees.

JESSEL, M.R.: The question I have to decide is one which comes before the court for the first time, for it appears that no reported case is to be found which decides the point. The case is this: A lady has a power of appointment over a fund by will among her children. She makes a will appointing the fund to one child and to a stranger in such terms that the appointees, supposing the appointment to be good, take by law as joint tenants. But of course she cannot appoint to a stranger, and the question therefore arises, What is the effect of the appointment? Now, it has been argued most elaborately that I am bound to apply to this case the rules of tenure applicable to the disposal of real estate. But I am not satisfied that I am so bound. As regards the instrument of appointment itself, there can be no doubt that it is a proper exercise of a testamentary power, and there is also no doubt that in construing such an exercise of the power you are to have regard to the intention of the person exercising it. What is the intention of the person exercising the power in this case? It is, as I understand it, to give the fund to two persons after her death. No doubt the gift was in terms to those two persons as joint tenants, but still, in substance—assuming the appointment to be good—if they both survived her each would take a

⁽¹⁾ 2 Ves. Sen., 640.

⁽²⁾ 5 Sim., 632.

⁽³⁾ Page 245.

⁽⁴⁾ Law Rep., 11 Eq., 371.

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half. If it had been real estate it would have been said there was seisin not only *per tout*, but also *per mie*. That was no doubt the intention. Now, the rule is well settled, that where there is an excessive execution of a power—that is, where some of the appointees are not objects of the power—where you can ascertain the shares intended for the objects of the power, the objects take these shares and a stranger takes none. Of course it is clear that if the appointment is to two persons as tenants in common they each take a half. But cannot I ascertain here whether it was the intention of the testatrix that each of the appointees should 605] take a half? I think I can. For the reasons I have already stated, it appears to me that such was her real meaning. It is somewhat singular that the arguments on each side were mutually destructive. On the one side it was said, “The appointment being to joint tenants, and failing as to one of them, I, as the remaining appointee, take the whole.” On the other side it was said, “We accept your argument that there is a joint tenancy, but as the testatrix evidently did not intend you to take the whole, and you cannot tell what your share is, if the appointment fails at all it fails altogether.” I hope, however, I decide the case according to common sense, and according to what must have been the clear intention of the testatrix. That being so, there will be a declaration that the petitioner is entitled to one half of the fund under the appointment, and that the other half goes as unappointed, and—there being no hotch-pot clause in the will creating the power—is divisible between the petitioner and the other lawful children of the testatrix.

Solicitors: *W. Sturt; T. H. Strangways; J. P. Sweetland.*

[4 Chancery Division, 605.]

M.R., Feb. 12, 1877.

CARTER V. WAKE.

[1875 C. 48.]

Equitable Mortgage—Deposit—Canada Bonds—Pledgee of Chattels—Right of Foreclosure.

The doctrine that an equitable mortgagee by deposit of title deeds is entitled to foreclosure, does not extend to a pledgee of personal chattels.

A. deposited with B. certain Canada railway bonds as security for a debt. On bill filed by B. for foreclosure or sale:

Held, that B. was entitled to an order for sale only.

IN the year 1874 the defendant mortgaged to the plaintiff certain ships, and also deposited with him (without memorandum) certain bonds of the Canada Southern Railway Company, as security for a debt. These bonds are first mortgage bonds, redeemable at par in the year 1890, but at present at a considerable discount in the market.

The bill in this suit was filed in the year 1875, praying for the usual accounts, and for a sale of the ships, and foreclosure of the equity of redemption in the bonds; or, in the alternative, for *a sale of the whole. The ships had since [606 been sold and the proceeds applied in reduction of the debt, leaving a sum of upwards of £4,000 still due to the plaintiff. It was stated that if the bonds were now sold, they would not produce enough to satisfy the debt, but that the plaintiff had calculated that if he could foreclose the equity of redemption now, he could repay himself in full by waiting till the bonds were redeemed in due course.

The suit now came on for hearing on motion for decree.

Miller, Q.C., and *T. L. Wilkinson*, for the plaintiff, submitted that he was entitled to a foreclosure decree, just as in the case of an equitable mortgagee of land by deposit of deeds. They referred to *James v. James* (¹).

The defendant did not appear.

JESSEL, M.R.: The plaintiff is in the position of a mere pledgee at law of certain chattels, and I do not think that a person in that position has the same right of foreclosure as a mortgagee by deposit of the title deeds of land. The principle upon which the court acts in the latter case is, that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the court has interfered to prevent that from having its full effect, and when the ground of interference is gone by the non-payment of the debt, the court simply removes the stop it has itself put on. Then, when there is a deposit of title deeds, the court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. None of this reasoning applies to a pledge of chattels; the pledgee never had the absolute ownership at law, and his equitable rights cannot exceed his legal title.

There will be an order for sale of the bonds by auction, but as there seems to be a good reason why the plaintiff should not be forced to part with them, I will give him liberty to bid, he not conducting the sale.

Solicitors: *Allin & Greenop*.

(¹) Law Rep., 16 Eq., 153.

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A bill in equity may be maintained to redeem a pledge, if an account is wanted, or if there has been an assignment of the pledge.

The pledgors of bonds secured by mortgages may redeem the bonds after fifteen years, notwithstanding the pledgee has foreclosed the mortgages: *White Mountains, etc., v. Bay State, etc.*, 50 N. H., 57; *Edwards on Bailments* (2d ed.), §§ 313-316, 321-323; 2 *Sto. Eq.*, § 1032; *Sto. on Bailments*, §§ 346, 348; 2 *Kent's Com.*, 581-2; *Stokes v. Cogswell*, 25 *How. Pr. Rep.*, 267.

See *Durant v. Einstein*, 35 *How.*, 223.

A suit in equity will lie to foreclose and sell the pledge; in which case an absolute title passes to the vendee: *Tyler on Pawns and Pledges*, 578-601; *Sto. on Bailments*, §§ 308-310, 311-321; *Edwards on Bailments* (2d ed.), §§ 279-297, 313, 317, 324, 331, 701; 2 *Sto. Eq. Jur.*, §§ 1033, 1217; *Bispham's Eq.* (2d ed.), §§ 358-9; *Hart v. Teneyck*, 2 *Johns. Chy.*, 62, 100; *Castelo v. City Bank*, 1 *N. Y. Leg. Obs.*, 25, 26, *Hoffman, Vice Chancellor*; 2 *Hilld. Mort.*, 420, 559; *Cairo, etc., v. Fackney*, 78 *Ills.*, 116.

See *Thames, etc., v. Patent, etc.*, 1 *Johns. & Hem.*, 93; *Paton v. Wilkes*, 8 *Grant's (U.C.) Chy.*, 252; *Trustees, etc., v. Brighton, etc.*, 27 *Ohio St. R.*, 435.

It has been held that the pledgee may, after the time for redemption has passed, upon due notice given to the pledgor, sell the pledge without a judicial decree of sale: 2 *Sto. Eq. Jur.*, § 1033; *Edw. on Bailm.* (2d ed.), §§ 279-297; *Bispham's Equity* (2d ed.), § 358; *Potter v. Thompson*, 10 *Rhode Island*, 1; *Fraker v. Reeves*, 86 *Wisc.*, 85; *Smith v. Coale*, 34 *Leg. Int.*, 58; *Davis v. Faust*, 39 *Penn. St.*, 250; *Stephens v. Bank*, 49 *Penn. St.*, 359.

See *Comstock v. Mechanics, etc.*, 3 *Hill*, 389; *Lewis v. Graham*, 4 *Abb. Pr. Rep.*, 106; *Genet v. Howland*, 30 *How. Pr. Rep.*, 360; *Milliken v. Dehon*, 27 *N. Y.*, 364, reversing 10 *Bosw.*, 325; *Durant v. Einstein*, 35 *How.*, 223; *Hunker v. Drake*, 49 *Barb.*, 186; *Markham v. Jaudon*, 41 *N. Y.*, 235, reversing 49 *Barb.*, 462; *Stewart v. Drake*,

46 *N. Y.*, 449; *Baker v. Drake*, 53 *N. Y.*, 211, 66 *N. Y.*, 518; *Devlin v. Pike*, 5 *Daly*, 85; *Bryan v. Baldwin*, 52 *N. Y.*, 232; *Wright v. Storrs*, 32 *N. Y.*, 691, affirming 6 *Bosw.*, 600; *Maryland, etc., v. Dalrymple*, 25 *Md.*, 242, 264.

But it may be doubted whether such a sale would divest the right of the pledgor to redeem: *Edw. on Bailm.*, §§ 279-297; 2 *Sto. Eq. Jur.*, § 1033; *Wheeler v. Newbould*, 5 *Duer*, 29, affirmed 16 *N. Y. Rep.*, 392; *Cortelyou v. Lansing*, 2 *Caines' Cas. in Error*, 200, as explained in note to *Wheeler v. Newbould*, 5 *Duer*, 36; *Joliet, etc., v. Scioto, etc.*, 82 *Ills.*, 548; *Bryan v. Baldwin*, 52 *N. Y.*, 232; *Campbell v. Parker*, 9 *Bosw.*, 322; *Haskins v. Kelly*, 1 *Abb. Pr. Rep.*, N.S., 63, 73; *Directors, etc., v. Minot*, 4 *Met.*, 325.

The pledgee cannot, on a sale to foreclose the lien, purchase the property pledged, unless authorized by statute, without the leave of the court. If he do so he will occupy the same position after the sale as before: *Story on Bailments*, § 319; *Edw. on Bailm.* (2d ed.), §§ 291-292, 324; *Directors, etc., v. Minot*, 4 *Metc. (Mass.)*, 325; *Maryland, etc., v. Dalrymple*, 25 *Md.*, 244, 265-8; *Bank v. Dubuque, etc.*, 8 *Iowa*, 277; 2 *Broom's Com.*, marg. p., 307, note by Mr. Wait (vol. 1, *Wait's ed.*, 616).

Unless the agreement for the pledge authorize him to do so, when in the absence of fraud he may do so: *Elliott v. Wood*, 45 *N. Y.*, 71, affirming 53 *Barb.*, 285.

The statutes of New York provide a cumulative remedy for a foreclosure of liens of innkeepers, boarding house keepers, mechanics, workmen, or bailees, upon chattel property: 2 *Laws* 1869, p. 1785, chap. 738.

As to how a carrier must sell unclaimed freight or baggage, when authorized by statute to sell: *Adams, etc., v. Schlessinger*, 75 *Penn. St. R.*, 246.

A constable who, on an execution against the general owner, removes the property from the possession of a pledgee, is guilty of a conversion: *Truslow v. Putnam*, 1 *Keyes*, 568.

[4 Chancery Division, 607.]

M.R., Nov. 8; Dec. 13, 14, 1876.

***HINKS & SON V. SAFETY LIGHTING COMPANY. [607**

[1875 H. 286.]

*Patent—Specification—Inconsistency between Claim and Description—Construction—
“As described”—Insufficiency—Novelty.*

Patentees of lamp-burners claimed by their specification as their invention the construction of burners “in the manner described and illustrated in the figures, that is to say, the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat wicks are placed so as to produce thereby one or more flat flames, or elliptical or nearly circular flames.”

The figures referred to showed burners with two wicks passing through a double-slotted cone. The use of two wicks with a single-slotted cone was old :

Held, that the claim could not be read as limited to burners with a double-slotted cone, and that the patent was bad for want of novelty.

A description in the specification of a lamp-burner omitted to state where the hole for the admission of air was to be :

Held, that the specification was insufficient.

THIS was a suit by a company incorporated under the name of James Hinks & Son, Limited, against the Safety Lighting Company, to restrain an alleged infringement of the plaintiffs' patent.

On the 18th of October, 1865, letters patent were granted to James Hinks and Joseph Hinks for certain improvements in lamps for burning paraffin oil and other volatile liquid hydrocarbons.

By the specification filed in pursuance of the said letters patent, on the 25th of October, 1866, the patentees described the nature of the invention and the manner in which it was to be performed as follows :—

“Our invention consists of the improvements hereinafter described in the burners of lamps for burning paraffin oil and other volatile liquid hydrocarbons, whereby two or more flat flames, or one circular or nearly circular flame, may be produced by the use of two or more single flat wicks. By the use of our invention the danger of breaking the chimneys which occurs from the use of a single flat wick is wholly removed, or much diminished, and in the case of curved wick-cases or holders great facility in trimming and placing the wicks in the said cases or holders is obtained, *and a much greater length of the wick utilized [608 than in ordinary Argand or circular burners.

“Our invention consists in the employment in the same burner of two or more flat or curved wick-cases or holders, in which said cases or holders single flat wicks are placed.

Each of the said wick-cases is provided with an axis and pinions for raising and lowering the wick contained therein. The wick-cases or holders are either straight or slightly curved, or of the figure of semi-ellipses or semicircular, so as to produce, when arranged in the burner, flat or elliptical or circular flames. The cone or deflector has two or more straight or curved openings in it, through which the wicks may pass. That portion of the top of the cone between the curved openings (when curved openings and curved wick-holders are employed) serves as a substitute for the ordinary button used with circular wicks; or a circular hole may be used in the cone and the ordinary button employed. When flat wick-cases are employed, straight openings are made in the cone."

The patentees then described, by means of the drawings accompanying the specification, the manner in which the invention was to be performed. Figures 1, 2, 3, 4, and 5 illustrated burners in which two flat wicks placed in two flat or curved wick-cases were arranged so as to pass through two openings or slots in an enveloping cone. Figures 6, 7, 8, 9, 10, and 11 illustrated burners similar to Argand burners, except that two flat wicks placed in curved wick-cases were substituted for the usual Argand wicks and wick-cases.

The specification then contained the following paragraphs:—

"Having now described the nature of our invention and the manner in which the same is to be performed, we wish it to be understood that we do not limit ourselves to the precise details herein described and illustrated in the accompanying drawings, as the same may be varied without departing from the nature of our invention; but we claim as our invention of improvements in lamps for burning paraffin oil and other volatile liquid hydrocarbons,—

"Firstly, constructing the burners of the said lamps substantially in the manner hereinbefore described and illustrated in *figures 1, 2, 3, 4, and 5 of the accompanying drawings, that is to say, the employment in the same burner of two or more flat or curved wick-cases or holders, in which two or more flat wicks are placed so as to produce thereby two or more flat flames, or elliptical or nearly circular flames.

"Secondly, constructing the burners of the said lamps substantially in the manner hereinbefore described in figures 6, 7, 8, 9, 10, and 11 of the accompanying drawings, whereby a circular flame is produced by the use of two single flat wicks."

Messrs. James and Joseph Hinks carried on business as lamp manufacturers till 1873, under the name of James Hinks & Son.

In April, 1873, the company of Hinks & Son, Limited, of which Messrs. James and Joseph Hinks were the principal shareholders, was registered, and by an indenture dated the 29th of June, 1873, which was afterwards duly registered at the Patent Office, the patentees assigned to the plaintiff company the said letters patent and the said invention, the subject thereof, and all rights and privileges thereby granted.

The bill alleged that the patentees, before the said assignment, and the plaintiffs since the assignment, had manufactured and sold large numbers of lamps constructed according to the said invention, to which they gave the name of "The Patent Duplex Lamp;" that the lamps had acquired great repute, and that the invention was one of great public utility, and very valuable to the plaintiffs as the owners thereof and the manufacturers of lamps made according to it.

The bill alleged that the defendants were manufacturing and selling lamps which were a direct infringement of the plaintiffs' patent, and prayed that they might be restrained by injunction.

The defendants did not dispute the infringement, but alleged, among other grounds of defence, insufficiency and want of novelty in the plaintiffs' specification.

One ground of defence arose thus: In 1871 J. G. Rollins purchased a large number of lamps with a double-wick lamp-burner and a single slot made according to an American patent taken out by Halvorsen dated the 20th of September, 1859, described in a volume of reports of the United States Patent Office for 1859, *which had been received at [610 the library of the Patent Office on the 31st of August, 1861, and then entered by the librarian in the catalogue. In September, 1871, Messrs. James Hinks & Son having seen an advertisement inserted by Rollins in the *Grocer*, a newspaper circulating amongst dealers in lamps, of the American double-wick burner, for which he invited orders, instructed their solicitors to write to Rollins warning him that the lamps referred to in the advertisement would be an infringement of their patent. They also put in advertisements in subsequent numbers of the *Grocer*, and sent a circular to their customers warning dealers in lamps against the threatened infringement. A correspondence took place between the parties, in the course of which Rollins intimated his belief that both the patents had been anticipated, so that both parties were interested in not raising a contest. As,

however, no compromise was agreed to, and Hinks & Son still continued their advertisement, and sent out circulars respecting the American lamps, Rollins filed a bill to restrain the publication of the advertisement and circulars; and on a motion before Vice-Chancellor Malins, in the suit of *Rollins v. Hinks* (¹), an injunction was granted. An appeal was threatened, and ultimately the parties came to terms, which were as follows: That Hinks & Son should grant a free license to Rollins, and that Rollins should write a circular to the trade stating that he had accepted a license from Hinks & Son to sell his burner.

It was also contended that the patent had in part been anticipated by one Little's patent.

The case now came on for hearing. The issues raised by the defendants were, want of novelty and insufficiency of the specification.

Each of the burners in the plaintiffs' lamps as manufactured, contained two wicks in parallel flat wick-cases in a cone or air deflector having a double slot. The scientific witnesses examined on the plaintiffs' behalf gave evidence to the effect that a workman of average skill could, by studying the specification and drawings, make a burner of that description; also, that at the date of the letters patent the combination in question was novel.

611] *On the other hand, the effect of the evidence of the defendants' witnesses was that the specification only described a combination of two flat wick-cases with a cone having a single slot.

Matthews, Q.C., *Chitty*, Q.C., *Cracknall*, and *Macrory*, for the plaintiffs: The evidence shows clearly that the language of the specification, coupled with the drawings, would enable a workman of ordinary skill to make such a burner as that patented by the plaintiffs: *Plimpton v. Malcolmson* (²). The specification must be read as a whole and reasonably construed, and when it relates to an invention of acknowledged utility the court will not adopt too strict a construction, the effect of which would be to vitiate the patent.

The novelty of the plaintiffs' invention consists in causing two parallel flat flames to unite above the double slot if raised high enough. This is expressly claimed by the specification. The apparent ambiguity in the specification is occasioned by the reference to the other method of producing a circular flame through one slot, but our first claim is not a claim to every mode of using two flat wicks, but

(¹) Law Rep., 13 Eq., 355.

(²) 3 Ch. D., 531.

only a claim to the use of two flat wicks in a double-slotted cone, and that is new.

Aston, Q.C., and *Byrne*, for the defendants: The plaintiffs' specification is bad for ambiguity, inasmuch as there is no precise description of the alleged invention. It is also bad for want of novelty, in so far as it includes a cone with a single slot. Halvorsen's patent was for a burner with two flat wicks and a single-slotted cone, and that was published in this country in 1861. The burners imported and sold by Rollins were made after the specification of that patent, and as Messrs. James and Joseph Hinks, who are substantially the present plaintiffs, at the time when the suit of *Rollins v. Hinks* ⁽¹⁾ was instituted, alleged that those burners were an infringement of their patent, as they found that their patent, as they then construed it, had been anticipated by Halvorsen's patent, they cannot now claim, on another construction of the 'specification, the benefit of novelty in their invention.

**Matthews*, in reply, referred to *Harrison v. Anderson Foundry Company* ⁽²⁾. [612

JESSEL, M.R.: I am anxious, as I believe every judge is who knows anything of patent law, to support honest *bona fide* inventors who have actually invented something novel and useful, and to prevent their patents from being overturned on mere technical objections, or on mere cavillings with the language of their specification so as to deprive the inventor of the benefit of his invention. This is sometimes called a "benevolent" mode of construction. Perhaps that is not the best term to use, but it may be described as construing a specification fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent. Beyond that the "benevolent" mode of construction does not go. It never was intended to make use of ambiguous expressions with a view of protecting that which was not intended to be protected by the patentee, and which has not been claimed to be so protected by him, whether or not it was an invention unknown to himself. It is for the patentee to tell the world that of which he claims a monopoly, to tell them, "You may do everything but this; but this you must not do, this is my invention."

With the view of getting this into a narrow compass, it has long been the practice of patent agents to insert in specifications the distinct claim of what they say is comprised in the patent, meaning that nothing else is com-

⁽¹⁾ Law Rep., 13 Eq., 855.

⁽²⁾ 1 App. Cas., 574.

prised, that everything else is thrown open to the public, or, to put it in other words, if a man has described in his specification a dozen new inventions of the most useful character, but has chosen to confine his claim to one, he has given to the public the other eleven, and he has no right to be protected as regards any one of the other eleven if he wishes to recall that gift which he has made by publishing the specification.

Now, what is the plaintiffs' patent for? It is for a burner for liquid hydrocarbons or paraffin oils. That is what the invention is for, and it is no doubt a burner which, in the 613] attempt to put it *in use, is one which has proved very successful and highly useful. On that there is no contest. It is thus described in the specification: "Our invention consists in the employment in the same burner of two or more flat or curved wick-cases or holders, in which said cases or holders single flat wicks are placed"—that is what the invention is.—"Each of the said wick-cases is provided with an axis and pinions for raising and lowering the wick contained therein. The wick-cases or holders are either straight, or slightly curved, or of the figure of semi-ellipses or semicircular, so as to produce, when arranged in the burner, flat or elliptical or circular flames."

There is a great difficulty in knowing exactly what that means—I mean as regards the "elliptical or circular flames." "The cone or deflector has two or more straight or curved openings in it through which the wicks may pass. That portion of the top of the cone between the curved openings (when curved openings and curved wick-holders are employed) serves as a substitute for the ordinary button used with circular wicks; or a circular hole may be used in the cone, and the ordinary button employed. When flat wick-cases are employed, straight openings are made in the cone."

Reading that description alone, I should have thought that it related to one invention, but I am bound to state that the inventors, having said that, proceed to refer to two sets of drawings, and when you come to the two sets of drawings, you may roughly describe them in this way, that the one set of drawings refer to lamps with two separate wick-cases, the tops of which are not straight but curved, that is, the wick-cases curve inwards. They produce two flames of course, and these two flames pass through two holes or slots in the cone; they continue separate above the cone, although, of course, they might be raised higher, and unite at some place above the cone. The interior of the lamp-

burners is supplied with air by an ingenious contrivance, though not a new one, through the wick-cases, and it is deflected upon the wick in a way which produces, as experience shows, a remarkably excellent light.

The other set of drawings describe a mere substitute for the old Argand burner—a different way of putting the wicks where flat *wicks are used; and is no doubt an in- [614]vention of little merit. The lamp does not appear to be in use, and it is of slight merit, and indeed it is a very trumpery matter. The lamp never appears to have been made, and the really useful invention is the first one.

Having, therefore, two lamp-burners of a substantially different sort, the inventors have naturally put in two claims, which I will call one for each. The material claim is the first. That claim is this: "We claim as our invention of improvements in lamps for burning paraffin oil and other volatile liquid hydrocarbons, firstly, constructing the burners of the said lamps substantially in the manner hereinbefore described, and illustrated in figures 1, 2, 3, 4, and 5 of the accompanying drawings, that is to say, the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat wicks are placed so as to produce thereby one or more flat flames or elliptical or nearly circular flames." What does that mean? It means, as I read it, to tell the public what is the substance of the drawings, as if they had said, "We claim the burner constructed substantially in the manner hereinbefore described and illustrated in figures 1, 2, 3, 4, and 5 of the accompanying drawings." That appears to me to be the natural and proper reading of the words, and I so read them. I think that was the meaning of the inventors as ascertained from reading the specification, with the knowledge I now possess, dispossessing myself, so far as it is possible (I use those terms not unadvisedly) of some portion of the evidence which has come before me. I do not say it is impossible to put another construction upon the words, and that another construction may not be presented, and that, in another state of facts, it might not be possible for some other judge to have adopted some other construction; but that, I think, is the fair and obvious meaning of the words of the claim.

The object and meaning of a claim is to put forth distinctly to the public notice—"That is my invention; you must not do this which I tell you is my invention; and when I tell you my lamp-burner is to be constructed substantially according to drawings, this is the substance of it, the

employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat
615] *wicks are placed so as to produce thereby two or more flat flames or elliptical or nearly circular flames." If that was the meaning of the claim, according to the scientific evidence adduced on the part of the plaintiffs, without any more, that was not new. It was anticipated undoubtedly by Halvorsen's patent, if not by others. But it was certainly anticipated, and upon that there is no contest whatever. The real contest was this: it was alleged by the plaintiffs that that was not the natural reading and meaning of the words—that the proper reading of the claim was this: "I claim not merely the employment in the burner of the two or more flat or curved wick-cases," and so on, "but I claim them as hereinbefore described or delineated in the drawings, or I claim them as hereinbefore described in combination with a cone with a double slot in it or two slots in it so as to produce thereby two flames." If that were the claim it would then raise another question, namely, whether the combination of the two wick-cases with the double-slotted cone was new or not? The scientific evidence of the plaintiffs said it was new at the date of the specification, and there was no scientific evidence to the contrary. So that, so far as that is concerned, there was evidence that it was new. The opposition to that rested on a specification. The substantial opposition arose really from a patent of a Mr. Little, and the only material difference between the two patents which was pointed out was this, that one used a round wick and the other a flat wick. On the one hand it was said you can never support a patent by substituting a round wick for a flat wick, as there is no invention in that. On the other hand it was said, Why not? If it is a combination patent, the very essence of a combination patent is that it is a new combination of known parts, and in fact very few machines are now invented which contain any new part. As a general rule, every machine invented is made up of parts which are previously known. A new part of a machine is very uncommon indeed; consequently that is an objection which, *per se*, is not of great weight. But, like every combination which is new, it must have merit, and now how is a judge to apportion the merit? I do not know. As far as I can ascertain from the authorities the merit very much depends on the result produced. Where a slight alteration
616] in a combination *turns that which was practically useless before into that which is very useful and very important, judges have considered that, though the invention

was small, yet the result was so great as fairly to be the subject of a patent; and, as far as a rough test goes, I know of no better.

Therefore, considering that Little's patent is said not to have been workable for any useful purpose, and this is not only workable, but has been worked to a great extent with a useful result, on this point my opinion is in favor of the plaintiffs, that there is sufficient in the substitution of the flat wick for a solid round wick to support the patent.

That was the substance of the objection as regards novelty. Then a second point was taken on the second burner, which was a very small affair indeed, and that was this: The second burner was badly drawn; the drawing did not show where the air was to get in. The thing itself may not be useful at all, and I am not sure that it is, but the utility objection not having been tried before me, I am bound to assume that it was. The reason why I am not sure, is that it never was put in practice. I cannot understand a practical lamp-maker not putting in practice a useful burner for so many years. That is my reason for doubting its utility, and I very strongly doubt it; but I am obliged, as a lawyer sitting here, to assume that it must have been sufficiently useful to come within the legal meaning of the term "useful" in patent law, which we know is very slight utility indeed. But even then it is a thing of very little merit; and then comes the question how far I am at liberty to correct the specification. The specification does not tell me where the opening is to let in the air. All it says is, "A circular hole is made in the cone or deflector, through which the circular flame passes." It is said that though there is no opening in the drawing, yet a workman could correct the drawing by putting in the opening, and he could correct it because he is told there is a cone or deflector, and the cone or deflector of the lamp means something or other which will deflect air, and therefore there must be sufficient air to be deflected and support the light and make it burn well. But, unfortunately for that argument, a lamp may burn badly although it is patented, and the patentee said it would burn badly, even *though the holes were exceedingly [617 small, or, as I understand, if there were no holes at all it would burn, but it would be an imperfect combustion. Why is a workman to know *a priori* that every invention will answer? I cannot say that an inventor never made an invention which did not answer. On the contrary, I am quite sure that many inventors have patented inventions which did not answer at all; and we had a very striking in-

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Hinks & Son v. Safety Lighting Co.

M.R.

stance in the course of this investigation, for several of the patented lamps were proved by the scientific and commercial evidence to be utterly useless, some because they were made on wrong principles altogether, and some because the makers did not understand what a lamp was wanted for at all, which is to give light.

Now, that being so, I am not prepared to say that, when you put your specification into the hands of a skilled workman, he is to exercise invention to make a lamp useful, that he is to correct it without being told anything to correct it by. This assumption was made, no doubt, by the very eminent scientific gentleman who gave evidence, Mr. Bramwell. Of course he could do it; he would know how to do it, and where to do it, and everything else. The other scientific gentleman could not deny that it was possible, but I take it that is not the meaning of the patent laws.

When you have such a little trumpery invention as the second, the whole merit of which is very small indeed, if you are to tell people how to do things better, you must tell them in a proper way, without the exercise of any invention or much trouble; and in my opinion this is not within the rule, and is badly specified. Though if I had been in the plaintiffs' favor on the other part of the case, and, if I may say so, have done all I could by any fair construction to get over this, yet I again repeat that I think it is a blot on the patent, a blot which can be cured by disclaimer (and for that reason I have gone into the other part of the case), but still a blot on the patent which I think would require disclaimer to get rid of it. I am fortified in the view I take of the meaning of the claim in this specification by the conduct of the inventors themselves, Messrs. James and Joseph Hinks, and I am obliged to refer to it because it is conduct which must lead to my strong judicial reprobation. At the time they took out this [618] patent, we have it in evidence from one of the *two inventors that they were not aware that the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat wicks are placed, so as to produce thereby two or more flat flames, was not new. They thought it was new, and thought they had found it out. Of course if they had found it out, they would take out a patent so as to secure that novel and important invention. Like many other inventors, they were not aware of what had been invented and patented in this country; much less were they aware of what had been invented and patented in America, and published in this country. It appears to have

been patented in a lamp which had not come into use, and the other lamp-makers had not heard of it, and it was invented and patented in America at an earlier date, and had been published in this country prior to 1865. It was Halvorsen's patent.

[His Lordship then stated the facts which led to the suit of *Rollins v. Hinks* ⁽¹⁾ and the terms on which it was compromised, and, after commenting on the evidence in the present case, continued:]

I am satisfied, independently of my construction of the specification, that Messrs. Hinks, or one of them, believed they had invented that which I consider to be their claim, and that they did intend to claim, as a matter of fact, that which they believed they had invented, and nothing else, and that the present attempt is a mere afterthought made to support the patent when they discovered, as they did discover on the view of Halvorsen's burner, and subsequently, that the other claim could not be supported. I regret to be compelled to come to such a conclusion. However anxious a judge might be to support a patent in favor of justice and honesty, I do not think he should strain a point of construction in favor of what he considers impropriety and dishonesty; and if I were at liberty to have used this evidence for the purpose of construing the patent, I should certainly not have refrained from doing so. But I believe I am not at liberty to do so; therefore I have been compelled to construe the patent independently, so far as I could divest my mind of those circumstances; and coming to that conclusion, I am very well satisfied to find the view I have come to, and fairly come to, is to my mind proved conclusively to *be the view entertained by [619 the patentees, though it may not bind in point of law the present plaintiffs, and it may not be available in point of law as regards the construction of the specification.

It follows from what I have said that the judgment I ought to give on the issues of novelty and sufficiency of specification is one for the defendants, and the bill will be dismissed with costs.

Solicitors for plaintiffs: *Field, Roscoe & Co.*, agents for Barlow & Smith, Birmingham.

Solicitor for defendants: *C. H. Edmands*.

⁽¹⁾ Law Rep., 13 Eq., 355.

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In re Speakman. Unsworth v. Speakman.

V.C.M.

[4 Chancery Division, 620.]

V.C.M., Dec. 19, 1876.

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**In re* SPEAKMAN.

UNSWORTH V. SPEAKMAN.

[1876 S. 381.]

Will—Construction—Gift to a Class—Death in Lifetime of Testator—Settlement of Share of Daughter.

A testator made a general gift by will of his real and personal estate to trustees upon trusts for sale and conversion, and to hold the proceeds in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, the share of each of his sons to be for his own absolute use and benefit. And he directed that the share of each of his daughters should be held upon trusts in effect for life for herself for her separate use, and after her death for her children. The will contained provisions for substituting the issue of sons dying in the lifetime of the testator for the sons, but no similar provision for the case of daughters.

A daughter having died in testator's lifetime leaving children who survived him :

Held, that the gift of the daughter's share did not fail, and that her children were entitled.

Stewart v. Jones (1) questioned.

DEMURRER. John Speakman, by his will, dated the 16th of March, 1872, after appointing the defendants his executors and trustees, and devising and bequeathing to them all his real and personal estate upon the usual trusts for sale and conversion, continued as follows :—

“I direct and declare that (subject to the charges thereon as herein mentioned) my said trustees shall stand possessed of my said trust estate and the moneys, proceeds, and income arising therefrom in trust for all my children (including Lucy and Joseph) who being a son or sons have attained or shall attain the age of twenty-one years, or being a daughter or daughters have attained that age or been married, or shall attain that age or be married, in equal shares, the share of each of my sons (other than my son David) to be for his own absolute use and benefit.”

The will then contained certain provisions as to the share
621] of *David, comprising an ultimate gift for the benefit of the testator's other children which was to include any accruing share or shares under the trusts thereafter declared, in case David died without having any child who should acquire a vested interest under the trusts of his share. And the will continued :—

“And as to the share of each of my daughters of and in my said trust estate, the same shall be held by my said trustees in trust to pay her the annual income thereof during her

(1) 3 De G. & J., 532.

life for her separate use free from marital control, debts, and engagements, and without power of alienation or anticipation, and on her receipts alone; and after her decease in trust for her child if only one, or for all her children if more than one, who either before or after her decease shall being a son or sons attain the age of twenty-one years, or being a daughter or daughters attain that age or marry, in equal shares; and in case any of my said daughters shall die without having any child who shall acquire a vested interest in their respective shares under this my will, then the share of each daughter, including any share or shares accruing under this present cross limitation, shall go to and be held in trust for such of my other children (including Lucy and Joseph) as being a son or sons have attained or shall attain the age of twenty-one years, or being a daughter or daughters have attained that age or been married, or shall attain that age or be married, in equal shares, the share of each son (other than my said son David) to be for his own use and benefit absolutely, and the share of my said son David and the share of each of my daughters to be held upon the same trusts and subject to the same directions and limitations over as are hereinbefore declared concerning his or her original share: Provided always, and I hereby declare, that if any son of mine shall die in my lifetime leaving a child or children, the child or children of the son or of each son so dying as aforesaid who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, shall take, and if more than one, equally amongst them, the share to which his, her, or their parent or respective parents would have been entitled of and in the said residuary trust estate and moneys if such parent had survived the testator and attained the age of twenty-one years, including any share or shares which would have accrued to such *parent under the trusts and provisions in that [622 behalf hereinbefore or hereinafter contained." The will then contained certain provisions relating exclusively to the interests of the testator's children Lucy and Joseph.

The testator died on the 31st of March, 1873. One of his daughters, Alice Unsworth, who was married and living at the date of the will, predeceased him, having died on the 10th of August, 1872. She had at her death four children, three of whom were the plaintiffs, the remaining one having died on the 24th of March, 1873.

The suit was instituted by these children for the administration of the estate of the testator, and by arrangement the demurrer was filed by the trustees of the will in order to

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raise the question whether, notwithstanding the death of Mrs. Unsworth in the lifetime of the testator, her children took the share designed for her.

J. Pearson, Q.C., and *Grosvenor Woods*, in support of the demurrer: The question is whether, under the provisions of this will, the children of a daughter who died in the lifetime of the testator can take anything. The shares are given absolutely to the testator's children in the first instance as a class, and unless the effect of this gift is modified by the subsequent part of the will, the result would be that the children who survived the testator would take the whole, and the children of those who predeceased could take nothing. Then the subsequent clause merely settles the share which the daughter, if living, would have taken, and if by having predeceased the testator she took nothing the settlement of the share which she would have taken if living does not by itself confer any interest on her children: *Olney v. Bates* ⁽¹⁾. This case is also covered by *Stewart v. Jones* ⁽²⁾.

Glasse, Q.C., and *Rigby*, for the plaintiffs: The distinction between this case and *Stewart v. Jones* is that in that case the words were, "the share to which each of my daughters shall become entitled." Here the testator speaks of the share of his daughter. But the rule in *Stewart v. Jones* will 623] *not be extended. It was disapproved of in *In re Potter's Trust* ⁽³⁾, the principle of which is quite applicable to the present case. The words here are equivalent to a substitution of the children of a daughter for herself in case of her death during his lifetime. That this is not a case in which the law as to gifts to a class is applied strictly, is pointed out in *In re Hotchkiss' Trusts* ⁽⁴⁾. The daughter does not really take an absolute interest, but, as in *Varley v. Winn* ⁽⁵⁾, the share is settled so as to give her a life interest only, with remainder to her children. It would be an unreasonable construction to make the remainder to the children dependent upon the time of the death of their mother being before or after that of the testator. Even where there is a clear gift to a class, the court is not altogether precluded from including those members of the class who die between the date of the will and the death of the testator, but is at liberty to look at the general intention of the will, and put such a construction upon it as shall give effect to the intention rather than defeat it: *Habergham v. Ridehalgh* ⁽⁶⁾; *Walker v. Main* ⁽⁷⁾.

⁽¹⁾ 3 Drew., 319.

⁽²⁾ 3 De G. & J., 532.

⁽³⁾ Law Rep., 8 Eq., 52.

⁽⁴⁾ Law Rep., 8 Eq., 643.

⁽⁵⁾ 2 K. & J., 700.

⁽⁶⁾ Law Rep., 9 Eq., 395.

⁽⁷⁾ 1 Jac. & W., 1.

Pearson, in reply.

MALINS, V.C., after reading the parts of the will above set out, continued :

The testator having given absolute interests to such of his sons as should attain twenty-one, and foreseeing the possibility of some of them dying in his lifetime leaving issue, says that the issue of the sons so dying are to take the share which the parent would have taken if living. But he makes no similar provision in the case of his daughters. And I think the reason of this difference is, that he was fully aware that by his will he had only given his daughters life interests with remainders to their children ; and that the effect of the death of a daughter in his lifetime leaving a child would be simply to let the child into possession immediately instead of waiting till the death of her mother.

Now, with regard to the construction of wills, the view I take, *a view which I have frequently expressed, is, [624 that the first step is to be satisfied what the intention of the testator really was, and then see how far the words of the will carry that intention into effect. As regards the intention in this case, even Mr. Pearson does not say that there is any doubt. It is beyond question that the testator intended his daughters to be tenants for life only, and if he effected this the death of one of them in his lifetime would simply accelerate the interests of her children. The position of a daughter if she survived the testator would be simply that of a tenant for life.

It would be an extraordinary thing to say that the daughter was to be a tenant for life, with remainder to her children if she survived her father, and not if she did not survive. I am quite satisfied that this testator simply intended his daughter to be tenant for life of her share. It is true that it was called her share, and it was her share for the purposes of division, and of ascertaining into how many shares the property was to be divided. But the intention to give it to the children in all cases of her death is so clear to my mind as to be beyond all possibility of doubt.

Being, therefore, clear as to the intention, I think it is evident that there are words sufficient to carry the intention into effect. Mr. Glasse has drawn my attention to a passage in the judgment in *In re Potter's Trust* ⁽¹⁾ bearing upon the decision in *Stewart v. Jones* ⁽²⁾, in which I made the following observations: "The only other case is *Stewart v. Jones*, where I am astonished to find that the present Lord Chancellor (then Vice-Chancellor Wood) held that the children of

⁽¹⁾ Law Rep., 8 Eq., 60.

⁽²⁾ 3 De G. & J., 532.

a parent who died between the date of the will and the testator's death were not entitled to take; on appeal, Lord Chelmsford affirmed the decision, stating that he entertained no doubt upon the case. There the language of the will was different from this; but that case appears to me to be so contrary to sound principle, that even if it had been precisely similar to the present I should have decided the other way, in order that it might have been reconsidered." That is the opinion which I then expressed, and which I adhere to now. The construction adopted in *Stewart v. Jones* was one which certainly defeated the intention of the testator 625] and did the greatest injustice. *On both grounds, therefore, my judgment is in favor of the plaintiffs in the suit. I consider that the intention is perfectly clear, and that there are abundant words in the will to carry the testator's intention into effect. I agree entirely with the observations of Vice-Chancellor James in *Habergham v. Ridehalgh* (1) as to the principles which ought to guide the court in the construction of wills, that is to say, they ought to be so interpreted as not to defeat the intention of the testator by technical rules of construction; but by considering the language in a free, liberal, and common sense spirit, to give effect to his manifest intention. On these grounds, therefore, I rest my decision, and the demurrer must be overruled.

Solicitors: *Field, Roscoe & Co.; Milne, Riddle & Mellor.*

(1) Law Rep., 9 Eq., 395.

[4 Chancery Division, 636.]

V.C.B., Feb. 8, 1877.

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*JONES V. HEAVENS.

[1877 J. 21.]

Injunction—Breach of Covenant not to carry on Trade—Liquidated Damages or Penalty.

A covenant—not to carry on, or be concerned in carrying on, either directly or indirectly, the business of a saddler, or sell any goods in any way connected with that trade within a distance of ten miles from C. under a penalty of £100, to be paid by way of liquidated damages for every such offence—is broken by selling goods as a journeyman in the employment of a person carrying on the particular trade in C.; and the breach will be restrained by injunction.

MOTION for an injunction to restrain the defendant from carrying on, or being concerned in carrying on, either 637] directly or indirectly, *the business of a saddler and harness maker, and from selling any goods in any way con-

nected with that trade within a distance of ten miles from the Town Hall of Croydon.

By a lease dated the 19th of May, 1874, the defendant, F. W. Heavens, demised unto the plaintiff a shop, No. 27 High Street, Croydon, for twenty-one years, at the yearly rent of £85. And the lessor (the defendant) did thereby for himself, his executors, administrators, and assigns, covenant with the lessee (the plaintiff), his executors, administrators, and assigns, "that he, the lessor, would not at any time during the said term carry on, or be concerned in carrying on, either directly or indirectly, the business of a saddler and harness maker, or sell any goods in any way connected with that trade, within a distance of ten miles from the Town Hall of Croydon aforesaid, under a penalty of £100, to be paid by him to the lessee, his executors, administrators, or assigns, by way of liquidated damages for every such offence."

In January, 1877, Sands, the defendant's brother-in-law, set up in business as a saddlery and harness-making business at 92 High Street, Croydon, in the name of "Sands, Saddler." On the 31st of January plaintiff's solicitor (Mr. Smith) entered the shop and asked a young man there for a leather strap. The young man showed some straps, but Smith not being satisfied, the young man said he would call Mr. Heavens. Heavens (the defendant) came down. Smith said he wanted a strap of a certain length. Heavens could not find one, but offered to cut one out. Smith chose another strap, for which he paid 2s., Heavens offering at first to send the young man out for change. Smith then asked Heavens if he was managing and carrying on the business, to which he replied "Yes," upon which Smith served him with a copy of the writ and notice of motion for an injunction.

According to the defendant's version, however, his reply to Smith's question was that he was not carrying on the business, but was "merely working for Mr. Sands as a journeyman to get a living for my wife and family."

The defendant, in his affidavit, stated that after the lease of 1874, he had set up in business at Woolwich, but was compelled in September, 1876, to file a liquidation petition, and had since been unable to get employment until January last, when his wife's *brother, Sands, commenced [638 business as a saddler in High Street, Croydon, and offered to take him on as a journeyman. He stated that he had no interest in such business either directly or indirectly, nor

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any share in the profits, but was a mere journeyman receiving a weekly wage of 30s., with apartments in the house for his wife and family.

Tremlett, for the plaintiff, in support of the motion.

Oswald, for the defendant: 1. The court will not interfere by injunction where a sum certain has been agreed upon as the price for a breach of the covenant, *Woodward v. Gyles* ⁽¹⁾; *Forbes v. Carney* ⁽²⁾; and the defendant has in effect purchased the right to do the act, *Sainter v. Ferguson* ⁽³⁾; especially if the covenant has been actually broken (in which case the penalty must be paid) and the breach is not merely threatened or intended: *French v. Macale* ⁽⁴⁾. The plaintiff's remedy is by action for recovery of the sum named as liquidated damages: Chitty on Contracts ⁽⁵⁾. In *Howard v. Woodward* ⁽⁶⁾ the nature of the agreement negatived the idea that the defendant had purchased liberty to do the particular act.

2. Assuming that a breach of this covenant would not be satisfied by payment of the sum stipulated as liquidated damages, there has been no breach; as what the covenant prohibits is carrying on the particular business and selling as a principal, and it does not preclude the defendant from being employed as a journeyman at fixed weekly wages by any other person carrying on the trade, or from selling in his shop: *Allen v. Taylor* ⁽⁷⁾.

[He also referred to *Newling v. Dobell* ⁽⁸⁾.]

[BACON, V.C., asked if the defendant was ready to bring the £100 into court.

Oswald was not instructed to assent to this.]

BACON, V.C., held that by acting as manager for another carrying on the particular trade the defendant had brought
639] himself *within the terms of his covenant not to carry on, or be concerned in carrying on, either directly or indirectly, that particular business, or sell any goods in any way connected with that trade. There had been a very clear breach of the agreement by the defendant, who was proved to have sold goods connected with the prohibited trade within the prescribed limits, and the plaintiff was accordingly entitled to an injunction.

Solicitors: *C. J. Smith; Hogan & Hughes.*

⁽¹⁾ 2 Vern., 119.

⁽²⁾ Cited in Joyce on Injunctions, 80.

⁽³⁾ 1 Mac. & G., 286.

⁽⁴⁾ 2 D. & War., 269,

⁽⁵⁾ 10th ed., pp. 809, 810.

⁽⁶⁾ 34 L. J. (Ch.), 47.

⁽⁷⁾ 18 W. R., 888; 19 W. R., 35, 556.

⁽⁸⁾ 19 L. T. (N.S.), 408.

See 10 Eng. Rep., 636 note.

An agreement not to exercise a trade, or carry on business, at a particular place, made upon good consideration, is valid, if shown to be reasonable, and if the restraint upon the covenantor be not greater than is proper for the covenantee in the enjoyment of his trade or business.

Canada, Upper : *Christie v. Clark*, 16 U. C. Com. Pl., 544, 27 Q. B., 21.

See *Dawes v. Wilkinson*, 19 U. C. Q. B., 604.

Illinois : *Linn v. Sigsbee*, 67 Ills., 75; *Trower v. Elder*, 77 Ills., 452.

Iowa : *Moorhead v. Hyde*, 38 Iowa, 382.

Massachusetts : *Dwight v. Hamilton*, 113 Mass., 175.

Michigan : *Beal v. Chase*, 31 Mich., 490; *Doty v. Martin*, 32 Mich., 462.

See *Caswell v. Gibbs*, 38 Mich., 331.

Missouri : *Peltz v. Eichels*, 62 Mo., 171.

New Hampshire : *Perkins v. Clay*, 54 N. H., 518; *Jenkins v. Abbott*, 54 N. H., 447, 449.

New Jersey : *Hoagland v. Segur*, 38 N. J. Law, 230.

New York : *Curtis v. Gokey*, 68 N. Y., 300, reversing 5 Hun, 555.

Pennsylvania : See *Harkinson's Appeal*, 78 Penn. St. R., 196.

An agreement not to carry on business "at St. Louis or elsewhere," is valid as to St. Louis, though invalid as to other places: *Peltz v. Eichels*, 62 Mo., 171.

An agreement not to engage in or carry on a business within certain limits, is broken by establishing a business outside the limits and, by an agent, supplying persons within the limits, if carried on sufficient to constitute a business, though an occasional sale would not be a breach: *Sander v. Hoffman*, 64 N. Y., 248, 50 How. Pr., 449; *Hoagland v. Segur*, 38 N. J. Law, 230.

See *Roller v. Ott*, 14 Kans., 615.

Where the vendor became the principal stockholder, president and business manager of a corporation organized to conduct a business in violation of the vendor's contract, with notice thereof, an injunction will be granted restraining the corporation from carrying on such business: *Beal v. Chase*, 31 Mich., 490.

Where the vendor sold his printing

establishment and the copyright of a popular book called "Dr. Chase's Recipes," with the good-will of the business and the right to use his name, and had covenanted not to engage in the business within the state while the vendee continued it, he was held precluded thereby from any right to publish in the state any receipt book so connected with his name as to lead to the inference that it was designed to supersede the old one: *Beal v. Chase*, 31 Mich., 490.

To same effect: *Dwight v. Hamilton*, 113 Mass., 175; *Peltz v. Eichels*, 62 Mo., 171.

Where the vendor agreed that the vendee should have the privilege of receiving the letters connected with the business, and of opening the same, it was held that the vendee was entitled to all correspondence intended for the establishment and business he had purchased, and that in case of doubt he was entitled to the benefit of the doubt; and a decree enforcing this stipulation by injunction against the vendor, and directing a power or authority to carry out its terms, was affirmed: *Beal v. Chase*, 31 Mich., 490.

To same effect: *Dwight v. Hamilton*, 113 Mass., 175; *Doty v. Martin*, 32 Mich., 462; *Berger v. Armstrong*, 41 Iowa, 447.

In order to entitle the purchaser to an *injunction*, however, he must allege a continuing and present engagement in the business: *Berger v. Armstrong*, 41 Iowa, 447.

Where a party under an agreement not to carry on a specified business, under color of another name, engages in a business which is within the spirit of the agreement, he will be restrained from continuing it. Where the answer fails to disclose the true character of the business so engaged in—whether it was, in fact, such as the defendant might carry on without a breach of his covenant, or whether it was so only colorably, the injunction will not be dissolved upon the answer, but will be retained until final hearing: *Richardson v. Peacock*, 26 N. J. Eq., 40; *Newling v. Dobell*, 19 Law Times Rep., N.S., 408.

The mere sale of the good-will of a business will not bind the vendor not to engage in the same business: *Moreau*

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v. Edwards, 2 Tenn. Chy. R., 347, and cases cited, p. 349; *Norris v. Howard*, 41 Iowa, 511.

When an agreement is made not to carry on business at a particular place it is not assignable, and can only be enforced for the protection and indemnity of the buyer, alone, while carrying on the business in person. There is no right of action to assign until after a breach of the conditions of the covenant: *Hillman v. Shannahan*, 4 Oregon, 163.

See also *Jones v. Wooley*, 16 Grant's (U.C.) Chy., 106; *Elves v. Scott*, 10 C. B., 241; *Kerr on Inj.*, 509, 510.

Under an agreement "not to locate in" a certain town "to practice as a physician and surgeon," it is not sufficient, certainly, in the absence of admitted fraudulent evasion, to justify the court in directing a verdict against him, to show that he has practised therein, but it must also be shown that he has been located there: *Ammedon v. Gannon*, 6 Hun, 384.

See *Dwight v. Hamilton*, 113 Mass., 175.

The advancement, by a parent to a child of money to commence business, is not a violation of an agreement by the parent not to carry on business, if the new business be in fact, and in good faith, that of the son and not of the parent: *Harkinson's Appeal*, 78 Penn. St. R., 196.

Where, after an agreement not to engage in business at a particular place, the purchaser himself and another entered into partnership with the seller for a year, held, that the formation of the partnership was inconsistent with the prior undertaking of the seller, and that at the expiration of the partnership he was absolved therefrom: *Norris v. Howard*, 41 Iowa, 508.

Where one producer of a commodity, for the purpose of enhancing the price, enters into a contract with another producer, binding the latter to withhold

and keep out of the market his supply, the contract is against public policy and void: *Arnot v. The Pittston, etc.*, 68 N. Y., 558, reversing 2 Hun, 591; *Caswell v. Gibbs*, 33 Mich., 331.

See, however, *Marsh v. Russell*, 66 N. Y., 288, overruling *Marsh v. Russell*, 2 Lansing, 340, and distinguishing many cases; *Caswell v. Gibbs*, 33 Mich., 331.

An agreement by A. not to purchase goods of any person except B., is void; though if B. have furnished A. goods, under an agreement that if he fail to pay therefor, B. may enter, take possession of the goods and wind up the business, B. may have the *remedy* provided for by the contract: *Fisken v. Rutherford*, 8 Grant's (U.C.) Chy., 9.

But see as to the illegality of an agreement not to sell to any person in a particular place except A.: *Roller v. Ott*, 14 Kans., 609; *Dean v. Emerson*, 102 Mass., 480; *McClurg's Appeal*, 58 Penn. St. R., 51; *Dunlop v. Gregory*, 10 N. Y., 241; *Beard v. Dennis*, 6 Ind., 200; *Thomas v. Miles*, 3 Ohio St., 274; *Schwalen v. Holmes*, 49 Cal., 665.

If by parol and for more than one year, the agreement is void under the statute of frauds. If the vendor repudiate it on that ground, the vendee may recover back the consideration paid: *Gottschalk v. Wilter*, 25 Ohio St. R., 76.

See *Ammedon v. Gannon*, 6 Hun, 384; *Christie v. Clark*, 16 U. C. Com. Pl., 544; *Doty v. Martin*, 32 Mich., 462.

One partner on a sale of the goodwill of the partnership cannot bind his copartner not to engage in the same business: *Moreau v. Edwards*, 2 Tenn. Chy., 347.

Rule of damages for breach of an agreement not to carry on business when damages not liquidated: *Peltz v. Eichels*, 62 Mo., 171; *Hoagland v. Segur*, 38 N. J. Law R., 230.

[4 Chancery Division, 639.]

V.C.B., Feb. 16, 1877.

DAWSON V. BANK OF WHITEHAVEN.

[1876 D. 133.]

Dower—Marriage before the Dower Act (3 & 4 Will. 4, c. 105)—Mortgage of Husband's Freeholds, the Wife joining and acknowledging in order to release her Dower—Right of Widow to redeem—Principal and Surety.

A wife, married before the Dower Act, who joined her husband in conveying, by deed acknowledged, his freeholds to a mortgagee free from dower, with a proviso for redemption in favor of the husband, and a power of sale directing the surplus to be paid to the husband:

Held to be entitled, when a widow, to redeem her dower.

In the above circumstances, the widow, having been a surety for the husband, is entitled, upon payment or satisfaction of the first mortgage debt, to hold the property comprised in the first mortgage as a security for her dower against the subsequent incumbrancer.

Husband and wife, having been married before the Dower Act, joined in a deed, acknowledged by the wife, in mortgaging the husband's freeholds, free of dower, to secure a debt of the husband. The reconveyance on redemption and the surplus proceeds of sale were reserved to the husband alone. Afterwards, by deed executed by the husband alone, the lands were purported to be conveyed, subject to the first mortgage, free of dower, to a second mortgagee. Then by deed, to which the first and second mortgagees only were parties, the second mortgagee took a transfer to himself of the first mortgage debt and securities; and afterwards sold the property:

Held, that the widow was entitled to dower out of the surplus proceeds of sale after payment of the expenses of sale, and of the first mortgage debt, interest, and costs.

Williams v. Owen ⁽¹⁾ held irreconcilable with *Hopkinson v. Rolt* ⁽²⁾.

TRIAL OF CAUSE. The plaintiff, Elizabeth Dawson, was the widow of John Dawson, *whom she married in [640 January, 1831. No settlement or agreement for a settlement was made before or after the marriage.

In December, 1846, John Dawson, being seised in fee of the manor of Blennerhasset and other hereditaments hereafter referred to as "the manorial property," and also of a freehold farm house, lands, and hereditaments hereafter referred to as "the Blennerhasset estate," borrowed £8,000, and by an indenture of mortgage dated the 24th of December, 1846, and made between John Dawson and the plaintiff of the one part, and Thomas Brocklebank and others, mortgagees, of the other part, and duly acknowledged by the plaintiff, in consideration of £8,000 paid by the mortgagees to John Dawson, the Blennerhasset estate, and all the estate and interest therein of John Dawson and the plaintiff, were expressed to be conveyed by John Dawson and the plaintiff to and to the use of the mortgagees, their heirs and assigns,

⁽¹⁾ 13 Sim., 597.

⁽²⁾ 9 H. L. C., 514.

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“freed, released, and discharged of and from all dower, and right and title to dower, of the said Elizabeth Dawson of, in, or out of the same hereditaments and premises,” but subject nevertheless to the proviso for redemption therein-after contained. The proviso for redemption provided that if repayment should be made with interest at £4 per cent. on the 24th of June, 1847, the premises should be reconveyed “to the said John Dawson, his heirs or assigns . . . or as he or they shall direct or appoint.” The indenture contained a power of sale, and a proviso that the surplus proceeds of sale should be paid, after payment of expenses incident to the execution of the power, and of the mortgage debt and interest, “unto the said John Dawson, his heirs, executors, or assigns, or as he or they shall direct.”

In 1854, and for some time previous, John Dawson was a customer of the defendants, the Bank of Whitehaven, Limited, and by a deed dated the 3d of November, 1854, and made between John Dawson of the one part, and Gilfrid William Hartley and another, trustees of the bank, of the other part, after reciting the mortgage deed of the 24th of December, 1846, and that there still remained due on the security of the same the sum of £8,000, with the current half-year's interest thereon, and that the bank had an account current open with John Dawson, for the purpose of securing the repayment of any sums which might at 641] *any time be owing to the bank from John Dawson, not exceeding £25,000, with lawful interest, the Blennerhasset estate and all the estate and interest of John Dawson therein were expressed to be conveyed, “freed and discharged of and from all right and title to dower of the said Elizabeth Dawson of, in, or out of the same hereditaments and premises,” but subject to the said indenture of mortgage of the 24th of December, 1846, to and to the use of the trustees, their heirs and assigns; and it was provided that if John Dawson should, on demand, pay to the trustees all and every the sums and sum of money which might for the time being be due upon his current account with the bank, the trustees would reconvey “unto the said John Dawson, his heirs and assigns forever, or otherwise as he or they shall direct or appoint.” This indenture also contained a power of sale, and it was provided that the surplus proceeds of sale, after payment of expenses, of the debt and interest secured by the indenture of the 24th of December, 1846, and of the debt and interest intended to be secured by the present indenture, should be paid unto the said John Dawson, his heirs, executors, administrators, or assigns, or

to such other person or persons as shall be equitably entitled thereto."

In 1858 the bank paid off the first mortgagees, and by a deed dated the 4th of December, 1858, and expressed to be made between the first mortgagees of the one part, and the trustees of the bank of the other part, the mortgage debt of £8,000 and interest was transferred to the trustees of the bank, and the Blennerhasset estate was conveyed to the same trustees, their heirs and assigns, "subject to such right or equity of redemption as the same premises are now subject to under or by virtue of the hereinbefore recited indenture" (namely, the indenture of the 24th of December, 1846), on payment to the trustees of the sum of £8,000 and interest.

In October, 1860, default having been made in payment of the moneys intended to be secured by the above indenture, the bank trustees sold the manorial property and also the Blennerhasset estate by public auction for £16,200. The purchaser settled with the plaintiff as to her dower on the manorial property, and as to that no question arose; but with regard to the Blennerhasset estate, the purchaser was not bound by the conditions of sale to *pay, and did [642 not pay, to the plaintiff anything in respect of her right of dower, if any.

On the 24th of November, 1874, John Dawson died.

On the 14th of October, 1875, the plaintiff filed this bill, alleging that she executed the indenture of the 24th of December, 1846, "only for the purpose of facilitating such mortgage and enabling the said John Dawson to obtain the advance of the said sum of £8,000, and not for the purpose of conferring any further benefit on the said John Dawson, or of releasing her right to dower out of the said mortgaged hereditaments and premises further than was necessary for securing the said principal sum and interest and expenses;" and contending that she was entitled to have assigned and secured to her her dower or the equivalent for the same out of so much of the £16,200 as arose from the sale of the Blennerhasset estate, after deducting what was due to the defendants for principal, interest, and costs, under the indenture of mortgage of the 24th of December, 1846; and, further, that "under the circumstances, she is entitled, upon the principle of exoneration from the debts of the said John Dawson, to have a proper proportion of the said purchase-moneys applied towards making good to her the dower to which, but for her exoneration and acknowledgment as aforesaid of the said indenture of mortgage of the 24th day of Decem-

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ber, 1846, she would be entitled out of so much of the Blennerhasset estate as is represented by the principal money and interest and costs which at the time of the said sale were due upon the security of the last-mentioned indenture."

The bill prayed, amongst other things, for declarations in terms corresponding to the above contentions.

The defendants, by their answer, said that, "if the plaintiff's purpose in executing and acknowledging the said indenture was only the purpose alleged by her in her said bill, and no other purpose, the defendants were not aware of any such limited purpose, and had no reason to conceive that the said indenture was intended to have any other effect than the natural and legal effect thereof, which the defendants submit was to wholly and absolutely release the said Blennerhasset estate generally of and from all right 643] whatsoever of the plaintiff in respect of her *alleged claim to dower therein, and particularly in the event of the sale thereof."

They met the contentions of the bill thus: On the several following grounds they denied that the plaintiff, upon John Dawson's death, became entitled to dower: 1. Under the deed of the 24th of December, 1846, it is plain that the plaintiff thereby voluntarily divested out of her husband the legal estate in the Blennerhasset estate, and that after the execution and acknowledgment of the deed there remained in her husband only an equitable estate, viz., the equity of redemption, which was reserved to him, his heirs and assigns, and not to him and her jointly, or to her severally, and this equitable estate was not subject to dower. 2. The deed contained a power of sale, with a direction that the surplus proceeds should be paid to John Dawson, or as he should direct. 3. The second mortgage contained a like provision. 4. The defendants accepted their security "upon the faith of the contents and effect of" the deed of the 24th of December, 1846; and it was upon the like faith that they "abstained from making or seeking to make" the plaintiff a party to their mortgage deed. 5. The defendants sold under the powers in the two deeds, and applied the proceeds as authorized by the deeds. 6. The hereditaments were sold and converted in John Dawson's lifetime with the consent and concurrence of the plaintiff given by her in the deed of the 24th of December, 1846. 7. The proceeds of the sale were insufficient, after payment of costs of sale, and the £8,000, interest, and costs, to discharge the defendants' debt, and there was no surplus. 8. The plaintiff's right to dower, if any, would be subsequent in date to the defendants' rights.

At the most, the plaintiff would be (but the defendants did not admit that she was) a surety for her husband in respect of the £8,000 and interest; but even as such she would have no claim for contribution against the purchase-money in the hands of the defendants.

Kay, Q.C., and *Dryden*, for the plaintiff: The plaintiff having been married before the 1st of January, 1834, her dower is, by sect. 14 of the Dower Act (3 & 4 Will. 4, c. 105), which was passed in August, 1833, excluded from the operation of that act.

*We make no claim against the purchaser, and he [644 is not a party. But, against the second mortgagee, who has got in the first mortgage, and has since sold the property, and holds the purchase-money, we claim to be entitled to dower on two grounds—one, that a wife joining her husband for the purpose of enabling him to mortgage his freeholds free of her dower, joins for the limited purpose of the mortgage only, and that when that purpose is fulfilled, is free to claim her right as before. Secondly, that a wife so joining, joins as surety for her husband's debt, and that upon the payment of the debt she is entitled as against the estate of the principal to the benefit of all the securities which the creditor held.

On the first point, we rely on *Earl of Huntingdon v. Countess of Huntingdon*⁽¹⁾, fully stated in Tudor's Leading Cases in Equity⁽²⁾; where other authorities are collected; and on the remarks in Tudor's Leading Cases in Conveyancing⁽³⁾, referring to *Dolin v. Coltman*⁽⁴⁾; *Lampet's Case*⁽⁵⁾; *Anon.*⁽⁶⁾; *Jackson v. Parker*⁽⁷⁾. The doctrine is treated by Lord Redesdale, in the course of his judgment in *Jackson v. Innes*⁽⁸⁾, as established⁽⁹⁾.

On the second point, that of suretyship, we rely on *Parteriche v. Powlet*⁽¹⁰⁾; *Drew v. Lockett*⁽¹¹⁾.

Where an estate is mortgaged, the equity of redemption remains subject to the old uses, *Wood v. Wood*⁽¹²⁾, whatever the form of the proviso for redemption or the power of sale. Where a husband executes a mortgage of his wife's chattels and dies, this is not a reduction of the chattels into the husband's possession, and the surviving wife has the right to redeem: *Clark v. Burgh*⁽¹³⁾.

⁽¹⁾ 2 Bro. P. C., 1.

⁽²⁾ Vol. ii, p. 1011.

⁽³⁾ Page 65.

⁽⁴⁾ 1 Vern., 294.

⁽⁵⁾ Co. Rep., 10, 46 a.

⁽⁶⁾ 2 Eq. C. Ab., 385.

⁽⁷⁾ Amb., 687.

⁽⁸⁾ 1 Bli., 104.

⁽⁹⁾ 1 Bli., 126.

⁽¹⁰⁾ 2 Atk., 383, 384.

⁽¹¹⁾ 32 Beav., 499.

⁽¹²⁾ 7 Beav., 183.

⁽¹³⁾ 2 Coll., 221.

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A. Brown (*Sir H. Jackson*, Q.C., with him), for the defendants: The case is not governed by authority; there is no recorded decision precisely in point.

In this case, there was by the first mortgage deed a complete extinguishment of the wife's right to dower—not merely 645] against *the purchaser (which is admitted), but against the husband's estate. In other words, the plaintiff, the widow, has no right to redeem in respect of her dower. The argument must be put as high as that. It is laid down in *Fisher on Mortgages* ⁽¹⁾, that widows who have been married before the Dower Act cannot “redeem mortgages made subsequent to their marriage when they have barred their dower;” the reference being to *Powell on Mortgages* ⁽²⁾.

Here the right to redeem was not reserved to the husband and wife jointly, as in *Jackson v. Parker* ⁽³⁾, and that authority does not apply. In *Dolin v. Coltman* ⁽⁴⁾, the husband expressly agreed that the wife should have the redemption. In short, there is no authority on the point in any of the English books; but the question seems to have been decided against the widow in an American case of *Manhattan Company v. Evertson* ⁽⁵⁾, as stated in *Abbott's New York Digest* ⁽⁶⁾. The learned Vice-Chancellor Ruggles, in delivering judgment in that case, relied upon *Banks v. Sutton* ⁽⁷⁾, *Chaplin v. Chaplin* ⁽⁸⁾, and *Cru. Dig.* ⁽⁹⁾; and these authorities are declaratory of the law of this court. In that case, no doubt, the deeds executed by the husband and wife were fraudulent, but the Vice-Chancellor said ⁽¹⁰⁾: “If it is otherwise, and all the beneficial interest of the grantors, after the performance of the specified trusts, resulted or reverted to” the husband “as contended by counsel, still” the wife “is not entitled to dower in that trust estate.”

The case was appealed; and the Chancellor of the State of New York (R. H. Walworth), in giving judgment, said: “Whether the conveyances from G. B. Evertson and wife to J. R. Evertson were absolutely void as against the creditors of the grantors, or operated as a valid transfer of the legal title, subject to a resulting trust in G. B. Evertson for the surplus, after paying the mortgage to the complainants, the Vice-Chancellor was right in supposing the 646] *widow was not entitled to dower in the surplus.

⁽¹⁾ 3d ed., vol. ii, p. 760, pl. 1232.

⁽²⁾ Page 286, note (S). But see *Powell on Mortgages*, 677, 678 note (D).

⁽³⁾ *Amb.*, 687.

⁽⁴⁾ 1 *Vern.*, 294.

⁽⁵⁾ 6 *Paige's Ch. Rep.*, 457.

⁽⁶⁾ Vol. ii, p. 741.

⁽⁷⁾ 2 *P. Wms.*, 700.

⁽⁸⁾ 3 *P. Wms.*, 229.

⁽⁹⁾ Vol. i, p. 488 (410?).

⁽¹⁰⁾ 6 *Paige*, 460.

In either case, as between the grantors and grantee, the legal title passed to the latter, and previous to the revised statutes, the widow could not be endowed of a mere equity" (').

The subject is discussed in Jarman's Bythewood's Conveyancing ('), where the learned writer maintains, against an array of opinions which he cites at length, treating Sir T. Sewell's remarks in *Jackson v. Parker* (') and those of Lord Redesdale in *Jackson v. Innes* (') as extra-judicial, that by a fine levied by husband and wife, the wife's right to redeem is absolutely barred and extinguished as much in equity as it undoubtedly is in law—the estate not originally having been hers, but the husband's—and quotes written opinions of Mr. Hayes and Mr. Bell to the like effect. The grounds of these opinions were two. First, it was said that, during the husband's lifetime, dower is not an estate but a right, and that "there can be no resulting use upon a conveyance operating as the release of a right, and not as the transfer of an estate": Sanders on Uses ('). Secondly, it was said that dower could flow only out of the seisin of the husband, which was gone at law; and that after the fine he had merely an equitable estate, out of which a widow before the statute was not dowable.

The defendants' rights are not affected in any way by their notice of the first mortgage. They took the second mortgage from the husband alone, not requiring any conveyance from the wife, on the faith that the dower was effectually barred.

If the first ground of the claim should be decided in favor of the plaintiff, it is admitted that the defendants cannot succeed upon the second. There is a decision in *Bowker v. Bull* (') which seems to make against the defendants; but in *Williams v. Owen* ('), where a mortgage debt was further secured by the covenant of a surety for the mortgagor, and the mortgagee made a further advance, and then recovered the first mortgage debt from the surety, it was held that the surety must pay the amount of the further advance before he could get an assignment of the property *to him; [647 and in *Farebrother v. Wodehouse* (') the Master of the Rolls, Lord Romilly, said he did not think Lord Cranworth, in *Bowker v. Bull* ('), intended to overrule the decision in *Williams v. Owen* ('). The result is, that the defendants in this

(1) 6 Paige, 465.

(2) 2d ed., vol. iv, p. 173.

(3) Amb., 687.

(4) 1 Bli., 106.

(5) 5th ed., vol. i, p. 226; referring to 13 Rep., 55; 22 Vin. Abr., 209 (O. 3.)

(6) 1 Sim. (N.S.), 29.

(7) 13 Sim., 597.

(8) 23 Beav., 18, 29.

case are entitled to tack their second advance, and to retain the securities for it against the surety, until the second debt is paid.

Kay, in reply: In the note by Mr. Jarman which has been read, several authorities are cited which oppose the position contended for by the writer, namely, that a wife who joins in conveying her husband's freeholds for the purpose of a mortgage only, cannot redeem; and amongst these opposing authorities are those of Sir T. Sewell in *Jackson v. Parker* ⁽¹⁾, and of Lord Redesdale in *Jackson v. Innes* ⁽²⁾. No one can read these authorities without perceiving that a recognition of the wife's right in equity to redeem is involved in each of them. Nor does Mr. Fisher (*Fisher on Mortgages* ⁽³⁾) say expressly that the wife has no right to redeem. The American case was one of absolute fraud.

If the first point be decided against the plaintiff, the second is too clear for argument. The widow joins for the purpose of giving up her right so far as the mortgagee is concerned, but no further. From that moment, she puts herself in the position of a surety. It is a question whether *Williams v. Owen* can stand as an authority after the decision in *Hopkinson v. Rolt* ⁽⁴⁾. In *Williams v. Owen* both the first and the second advances were made by the same person.

BACON, V.C.: Although the question in this case is a nice one in some respects, yet it becomes very plain when it is considered that it must rest upon principles of law which are perfectly established.

In the face of the authorities, there can, I conceive, be no doubt that a wife who joins her husband in making a mortgage for a specified purpose, to secure the sum mentioned [648] in the mortgage *deed, does not (although in form she releases her right to dower) within the meaning and operation of that deed release any more than is necessary to satisfy that mortgage, and that all beyond belongs to her—I mean all beyond of her right to dower. That is covered by authority. The decision of Sir Thomas Sewell at the Rolls, and the doctrine laid down by Lord Redesdale in *Jackson v. Innes* ⁽⁵⁾, on which the decision of the House of Lords proceeded, have entirely established the principle. Then it is said that I must listen to the American case, which has been cited as an authority for the purpose. I have not

⁽¹⁾ Amb., 687.

⁽²⁾ 1 Bli., 123.

⁽³⁾ 3d ed., vol. ii, p. 760, pl. 1232.

⁽⁴⁾ 9 H. L. C., 514.

⁽⁵⁾ 1 Bli., 104.

had an opportunity of reading the American case. I should not, of course, adopt it as a binding authority upon me under any circumstances, but I should very thankfully receive any information it could convey to me, and I should without scruple follow it if I thought it was directly applicable and right in itself. But when, upon the very face of it, the transaction out of which the claim arises is a fraudulent conveyance by the husband and wife, to defeat the husband's creditors, to a trustee, upon trusts, no one of which entitles the wife to redeem—when I find that that is a great feature in the case, and must have influenced the judgment—the deed being set aside against the creditors, but said to be good as between the husband and the wife and the trustee, and containing no power to redeem, but having a directly contrary operation, I cannot conceive that that case has any application to the question raised before me here.

What I have to deal with here is a plain principle of equitable law; and I find, as I have said, that the authorities do establish it as a plain principle, that, subject to the payment of the mortgage debt, for which purpose, and for which purpose alone, the wife joins in the conveyance, she, that purpose being answered, is entitled just as she was before. If the husband had exercised the power of redemption, his estate would have been the same as it was before, and his wife would have been dowable under it.

Then, considering it upon principle, and not disregarding the cases which have been referred to, can anything be more plain or more just in itself than that the wife, who lends her dower (for that is exactly what she does), and pledges it for her husband's debt, is entitled to all that remains after that purpose is satisfied? *It is said there is no case on [649 the subject. I am not at all surprised that there is no case on the subject; but there is decision enough. It is not surprising that no such case should ever have been raised. Upon the first point, therefore, I entertain no kind of doubt that the wife had, notwithstanding the terms of the proviso for redemption, a right to redeem, and that the extent of the security which she gave was not greater than the sum which it was proposed to secure by the mortgage. But, beyond that, her right remains as if no mortgage deed had ever been executed, and her husband could not have deprived her of it under the terms of the proviso for redemption. By no legal means could she be deprived of that which she had not, in the view of a court of equity, parted with entirely, even if she had at law released her dower.

Nothing could deprive her of that which belonged to her, and resulted to her, as soon as the limited purpose for which she surrendered her right to dower had been satisfied.

There is no case that conflicts with this. *Williams v. Owen* (¹), which is a case about which I desire to say as little as may be, has a very remote application to this case, if it has any. It would, in my opinion, as I read it at present, be at variance entirely with the principle of *Hopkinson v. Rolt* (²). In that case a mortgagee had advanced a sum of money, and had consented to advance more, and, although another mortgage had been created in the meantime, he made a further advance, with notice of the second mortgage, and nevertheless claimed priority. It was held that he was not so entitled, because he had had full notice of what was done. Notice is not wanting in this case; because there is a passage in the answer, which contains in most explicit terms the assertion on the part of the defendants that, when they took their mortgage of 1854, they knew that the wife would not be a party, they did not choose to ask her to be a party, and they chose to run the risk, knowing all the circumstances, and knowing, as I am bound to say they must have known, because they ought to have known, that she had a right to redeem, and that the pledge made by her was of a limited nature. I should find it difficult, if it were necessary, to reconcile *Williams v. Owen* with that universal [650] principle in the law of suretyship, that the *surety is entitled to the benefit of any security which the secured creditor may hold. It is true that the surety there had not been a party to the transaction. I cannot conceive that that makes any difference if the law be, as I take it to be, that a surety is entitled to the benefit of any security held by the mortgagee in the transaction in respect of which the surety incurs an obligation. It is not necessary to pursue that further, because the other case mentioned, besides those at the Rolls—I mean the case of *Bowker v. Bull* (³), before Lord Cranworth—carries it still further; and the right contended for here is, in my opinion, indisputable.

Then, finding the decisions to be such as they plainly are, that the wife has a right to redeem, and finding the fact unquestionably to be that she joined in the security which is proved in evidence, only for the limited purpose of securing the sum mentioned in the first mortgage deed, I consider that the second mortgagee who paid off that mortgage can have no other right than the husband would have had if he had redeemed, and that the subsequent security could not

(¹) 13 Sim., 597.

(²) 9 H. L. C., 514.

(³) 1 Sim. (N.S.), 29.

affect that right which by this suit she asserts, namely, to get the value of her dower established, against the defendants, who have sold and received the price for the whole of the estate, including, as it did, the limited interest which by the deed she had consented to charge.

In my opinion the bill is perfectly right. The relief sought by it cannot be resisted, and the decree must be made to that effect in the plaintiff's favor.

The following are minutes of the order:—

Inquiry as to value of dower of widow in the Blennerhasset estate.

Inquiry what proportion of surplus purchase-money beyond the £8,000 and interest was proceeds of or to be treated as proceeds of the Blennerhasset estate.

Inquire whether widow has received from the purchaser any compensation for dower in respect of any part of the Blennerhasset estate.

Order defendant to pay value of dower out of such part of surplus.

Order defendant to pay costs of suit.

Solicitors: *Gregory, Rowcliffes & Rawle*, agents for Atkinson, Collins & Atkinson, Whitehaven; *Johnston & Harrison*, agents for Postlethwaite & Brown, Whitehaven.

[4 Chancery Division, 651.]

V.C.H., Nov. 11, 1876.

*CHANDLER V. HOWELL.

[651

[1875 C. 300.]

Mortmain Act—Public Body—Improvement Commissioners, Mortgage by—Works, Rents, and Rates—Charity—Interest in Land.

The act for improving the town of Aberystwith, and supplying the inhabitants thereof with water, vested in the commissioners thereunder the works and the soil thereof, and authorized them to purchase land, to construct and carry on waterworks and gasworks, and to make rates upon occupiers of lands, and recover them by distress.

Mortgages by the commissioners whereby, under the borrowing powers conferred by the act, they granted and assigned the "works, rents, and rates," authorized by the act, to the lender until the sum borrowed should be repaid:

Held, to confer upon the lender an interest in land within the Statute of Mortmain.

Holdsworth v. Davenport ⁽¹⁾ distinguished.

THE act 5 & 6 Will. 4, c. 46, "for improving and regulating the town of Aberystwith, and supplying the inhabitants thereof with water," by sect. 25, vested in the commissioners thereunder (now represented by the corporation) the squares, roads, streets, and carriage and footways within the town, and the ground and soil thereof, with the pavements and drains, and all buildings and works to be made or provided by virtue of the act; and by sects. 26 and 27, empowered the commissioners to construct and carry on gasworks and waterworks for the supply of the town. The act also em-

⁽¹⁾ 3 Ch. D., 185.

powered the commissioners to charge gas and water rents, and to let such rents for three years to any person willing to farm the same (who was to have the same powers for enforcing the rents as the act vested in the commissioners); to remove obstructions and projections from buildings, to set back the line of houses taken down to be rebuilt; and gave them other powers for the paving, lighting, watching, repairing, widening, and otherwise improving the town. By the 116th section, the commissioners were empowered to purchase lands by agreement for the purposes of the act; by 652] sect. 137, to resell such part thereof *as should not be wanted; and by sect. 139, it was enacted that in all assurances to be made by them the words "grant and convey," or "grant and assign," should operate as covenants for title. The commissioners were then empowered, by sect. 140, to make rates for the purposes of the act, and to recover them by distress, and by sect. 150, they were empowered, "from time to time, when they shall judge necessary for the purpose of carrying this act into execution, to borrow and take up at interest any sum or sums of money not exceeding in the whole the sum of £12,000, and by any writing under the hands and seal of any five, or more of them, to mortgage, demise, grant, or assign over the works, rents, and rates, to be erected, reserved, and made under this act, or any part or parts thereof, to the person or persons who shall advance or lend such money as a security or securities for the money so to be borrowed, with interest for the same and every such mortgage may be in the words or to the effect, following":—

"By virtue of" (the act), "we, the undersigned, being of the commissioners, acting in execution of the said act, in consideration of the sum of pounds, advanced and lent by to the said commissioners, upon the credit of the works, rents, and rates authorized to be erected, reserved, made, and collected by the said act, do hereby grant and assign unto the said, his executors, administrators, and assigns, such proportion of the said works, rents, and rates as the said sum of £ . . . doth or shall bear to the whole sum borrowed, or to be borrowed or charged upon the credit of the same works, rents, or rates, to be had and holden from the day of the date of these presents until the said sum of £ . . ., with interest for the same" (after the rate specified), "shall be fully repaid and satisfied. In witness," &c.

The late Mrs. Anne Pughe, in June, 1865, lent to the

corporation of Aberystwith, under the provisions of this act, the sum of £400 upon the security of a mortgage of the works, rents, and rates authorized by the act in the form given above; and she died in 1874, having, by her will, devised and bequeathed her residuary real and personal estate upon trust, to divide the same between two charities. A suit having been instituted to carry into execution the trusts of this will, the question arose, and *was now [653 argued upon further consideration, whether the £400 secured by this mortgage was pure personalty and available for the charitable bequest, or was an interest in land within sect. 3 of the Statute of Mortmain.

Dickinson, Q.C., and *T. A. Roberts*, for the plaintiffs, who were the treasurers and trustees of the National Hospital for the Relief and Cure of the Paralyzed and Epileptic (one of the two charities interested): This mortgage is pure personalty, and not within the Statute of Mortmain. The mortgage is in form only an assignment of a proportion of the "works, rents, and rates" authorized by the act, which gives to the mortgagee no interest in, or right of entry upon, any land which may be vested in the commissioners, but only a right to the rates when collected, and in the shape of moneys in the hands of the commissioners. There is no distinction between a mortgage in this form and a mortgage by a public company of their undertaking. In *Holdsworth v. Davenport* ⁽¹⁾ Vice-Chancellor Malins decided that a mortgage by a waterworks company of their undertaking, and the rents, rates, and sums of money arising under their acts, was not within the statute. In *Gardner v. London, Chatham and Dover Railway Company* ⁽²⁾, where the mortgage was of the general undertaking of a railway company, and "all the tolls and sums of money arising" out of the general undertaking, the nature of these mortgages or debentures was explained; and it was held that the mortgagee could not break up the "undertaking," which was the living going concern, nor seize the lands which were part of it, but was only entitled to its earnings. Any real estate which is vested in the commissioners under this act is so vested simply to enable them to carry out the purposes of the act, and to perform the duties thereby imposed upon them, i.e., to supply the town with water and gas; and not for the purpose of enjoyment in the ordinary character of owners of real estate. And that which they can mortgage is what they get for supplying the water and gas, i.e., the rates, and it cannot be that persons who lend to them moneys to enable

⁽¹⁾ 3 Ch. D., 185.

⁽²⁾ Law Rep., 2 Ch., 201.

these supplies to be continued can enter upon or take away 654] *the lands so held; for by this means they would bring about the stoppage of the works, the very result the loan itself was intended to prevent. Then, on principle, real property purchased for the purpose of carrying on a business is not within the statute. It was not at interests of this nature that the Legislature intended to strike in passing the Mortmain Act, and the tendency of modern decisions is to restrict the application of that act: *Myers v. Perigal* ⁽¹⁾.

HALL, V.C., then called upon the counsel for the defendant.

Morgan, Q.C., and *Elphinstone*, for the defendant, who was the trustee and executor of the testatrix, and also one of the residuary legatees: There is a clear distinction between the present case and those cited on behalf of the plaintiffs. This is not a mortgage by a public company of its undertaking, as in *Holdsworth v. Davenport* ⁽²⁾ and *Gardner v. London, Chatham and Dover Railway Company* ⁽³⁾, nor a bequest of shares in a joint stock bank, part of whose assets consisted of lands, as in *Myers v. Perigal*. Joint stock companies are nothing more than partnerships, and the reasoning of Vice-Chancellor Malins, in *Holdsworth v. Davenport*, is that debentures of joint stock companies, which are an assignment of shares, are no more within the Mortmain Act than the shares themselves; his Lordship's direct *ratio decidendi* was, however, the decision in *Gardner v. London, Chatham and Dover Railway Company*. Now here, not only the works, but the soil of the ground on which they stand, is vested in the commissioners in fee simple, with an absolute power to sell what they do not want; and our mortgage is a grant of the "works," the fee simple of which is so vested in the grantors, the "rents," which are the annual profits derived from the letting of the works, and the "rates," which are levied upon the occupiers "of all messuages, tenements, and hereditaments within" the town, and which are recoverable by distress. Can it be said that this is not an interest in or a charge or incumbrance affecting lands, tenements, or hereditaments within the 3d 655] *section of the Mortmain Act? In *Finch v. Squire* ⁽⁴⁾ it was decided by Sir W. Grant that moneys lent upon the security of poor-rates and county-rates were within the statute, and that there was no distinction in that respect between such a security and a security upon turnpike tolls.

⁽¹⁾ 2 D. M. & G., 599, 619.

⁽³⁾ Law Rep., 2 Ch., 201.

⁽²⁾ 3 Ch. D., 185.

⁽⁴⁾ 10 Ves., 41.

So likewise in *Howse v. Chapman* ⁽¹⁾, bonds granted by the commissioners for the improvement of the city of Bath were held to be within the statute.

The exact point, however, came before Vice-Chancellor Wood, in *Thornton v. Kempson* ⁽²⁾, where moneys secured by an assignment by way of mortgage, from the commissioners for paying, lighting, watching, cleansing, and otherwise improving (the same purposes as in the present act) the town of Birmingham, of the town hall rates, were held to be affected by the statute. The present case, however, is stronger, for the mortgage here comprises the works, and so the land itself as well as the rates. As Vice-Chancellor Wood said, in *Thornton v. Kempson*, the commissioners have assigned the power of collecting the rates, and the mortgagee is entitled not only to the money raised, but to have the powers of the commissioners for raising it put in force, either by a mandamus at law or a receiver in equity. That is the right of the mortgagee here, and this distinguishes the case from the mortgages of trading companies in the nature of partnerships, whose holding of land is only incidental to their trade, as in the cases of *Gardner v. London, Chatham and Dover Railway Company* ⁽³⁾ and *Holdsworth v. Davenport* ⁽⁴⁾, for there the mortgagee has no such right. The very form of the mortgage given by such a company is different. It is a mortgage of the undertaking, not of the soil of the railway, but of something which is got by the user of it.

Kekewich, for the Brompton Hospital, the other of the two charities interested.

Dickinson, in reply: The real question is, whether these mortgages were to confer on the mortgagee an interest in the tree or in the fruit, and according to *Gardner v. London, Chatham and Dover Railway Company*, *it is to be 656 in the fruit only. In *Bunting v. Marriott* ⁽⁵⁾ bonds of the Tothill Fields Improvements to secure money borrowed by them on the credit of the rates under the act, and in *Edwards v. Hall* ⁽⁶⁾ shares in an incorporated company, were held not to be interests in land within the Statute of Mortmain; while in *Entwistle v. Davis* ⁽⁷⁾ the shares of a company, the business of which was the purchase and improvement of lands, were also held not to be within the statute.

There is no distinction in principle between a trading corporation supplying water for money, and a municipal cor-

⁽¹⁾ 4 Ves., 542.

⁽²⁾ Kay, 592.

⁽³⁾ Law Rep., 2 Ch., 201.

⁽⁴⁾ 3 Ch. D., 185.

⁽⁵⁾ 19 Beav., 163.

⁽⁶⁾ 6 D. M. & G., 74.

⁽⁷⁾ Law Rep., 4 Eq., 272.

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poration doing the same ; nor between a mortgage by one of its "works" (which must mean its waterworks), "rents, and rates," and by the other of its "undertaking" (a word completely analogous to works), "rents and rates." Neither can be held to confer on the mortgagee the right to prevent the undertaking, for the purposes of which the mortgage was given, from being carried on, and so to expose the company to the penalties which would result if land which must remain in them for the purposes of their undertaking was taken away from them and given to a charity.

HALL, V.C.: The act of Parliament under which the mortgage in question was created is an act for improving and regulating the town of Aberystwith and supplying the inhabitants thereof with water ; it provides for rates being levied by the commissioners, it gives power to distrain upon the occupiers for those rates, it authorizes them to acquire property for the purposes of their undertaking, and it authorizes them to borrow money. [His Lordship then stated section 150, and the form of mortgage thereunder.] The security in question is made under the power and in the form given by the act, and the question is, whether such a security is capable of being disposed of in favor of a charity ; in other words, whether it is within the Statute of Mortmain. The cases upon the statute have certainly not been uniform. One of the earliest cases upon the subject is *Knapp v. Williams*, reported in a note to the case of *Corbyn v. French* (¹). 657] That case was decided by Lord Eldon, *in 1798, and his Lordship in his judgment said : "It occurred to me that it had been determined that a mortgage of turnpike tolls is within the statute"—this was a case of turnpike tolls.—"The mortgagee would have a right to come into this court to have an account and a receiver appointed. He would have a right, by the aid of this court, to have the tolls specifically applied to his mortgage. Consider what the point of law is from the nature of the interest. It is not at all within the mischief ; but the consequences would open a much larger field for charitable donations. From the nature of the interest created by the act these tolls, granted in perpetuity, are certainly a hereditament ; it is in its nature an interest affecting land. He might bring an assize for these tolls, I should think. There is another species of toll which gives no right at all in the land, that is a toll thorough."

The case which has been referred to of *Howse v. Chapman* (¹) was also before Lord Eldon, and there a similar question arose as to certain bonds which had been given to

(¹) 4 Ves., 542.

the commissioners for the improvement of the city of Bath. The exact nature of those bonds does not, I think, appear from the report, but there were inquiries taken and accounts directed, and the master in his report says: "That part of the personal estate which was held not to pass by the bequest for the improvement of the city of Bath consisted of mortgages to the amount of £4,950, five bonds of the commissioners for the improvement of the city of Bath, four bonds of the corporation of Bath, and four bonds of the commissioners of a turnpike." And the report refers to *Knapp v. Williams* as the authority upon which that holding in *Howse v. Chapman* proceeded. So that we have here two decisions, as I must take it, of Lord Eldon upon this question of turnpike bonds and bonds of the commissioners for the improvement of the city of Bath. Those two decisions were followed by Sir William Grant in *Finch v. Squire* ⁽¹⁾. The question was considered again in *Myers v. Perigal* ⁽²⁾, and two classes of property were the subject of the decision in that case, one, shares in a joint stock bank, and the other, a debenture or security in the nature of a bond or *promise to pay by the Newcastle and Carlisle Rail- [658 way Company; and there Vice-Chancellor Sir Lancelot Shadwell considered that the debenture in question was not within the Statute of Mortmain. The Vice-Chancellor, however, based his decision in that case upon grounds which would certainly not embrace the security or mortgage in the present case; for in giving judgment in that case he says, in reference to the 62d section of the act there in question by which justices of the peace might, upon the request of a mortgagee thereunder appoint a receiver ⁽³⁾, "the language, you will observe, is 'to receive the whole or such part or parts of the said rates as are liable to pay the interest.' But by the debenture in question the rates are not made liable at all. It contains nothing that amounts either to an assignment of the rates or to a declaration that they shall be liable. It amounts to nothing more than a promise to pay £600, or so much money borrowed on the credit of the undertaking. Therefore it cannot give the holder, whose interest is in arrear, any right to apply to the justices of the peace, under the 62d section of the act, to appoint a receiver of the rates." Then he comments upon that section, and shows that it does not apply. That appears to me to be the ground on which the Vice-Chancellor rested his decision with regard to the security in *Myers v. Perigal* ⁽⁴⁾, and the

⁽¹⁾ 10 Ves., 41.⁽²⁾ 16 Sim., 533, 542.⁽³⁾ 16 Sim., 542.⁽⁴⁾ 16 Sim., 533.

case is accordingly no authority in favor of the plaintiffs in this case, but, on the contrary, the judgment being based on the special form of the security, it rather goes the other way. The decision of Vice-Chancellor Shadwell upon this point was not the subject of the appeal ⁽¹⁾, but we cannot fail to see that when the case came before Lord St. Leonards, upon appeal as to the question of the shares, he guarded himself particularly from expressing any opinion in favor of the validity of the disposition as to the debenture. Therefore that case is in neither court an authority in favor of the parties who contend here that these debentures pass effectually, notwithstanding the Statute of Mortmain.

In the case of *Ashton v. Lord Langdale* ⁽²⁾ Vice-Chancellor Knight Bruce certainly expressed his view as being that such a security as this was an interest in land within the 659] Mortmain Act. *In *In re Langham's Trusts* ⁽³⁾ Vice-Chancellor Wood held a bequest of shares in a canal navigation company for charitable uses to be good; but a bequest of securities upon the tolls, rates, and duties, and upon the general estate of the company, created by assignment thereof by way of mortgage, to be void, as being a charge upon land within the meaning of the statute; and he took the same view in the subsequent case of *Thornton v. Kempson* ⁽⁴⁾. On the other hand, in *Walker v. Milne* ⁽⁵⁾, Lord Langdale, M.R., held, in 1849, that dock and canal shares and bonds, secured by an assignment of rates, was not an interest in land within the statute. And again, in *Ion v. Ashton* ⁽⁶⁾, Romilly, M.R., held that a charge upon tolls was within the Statute of Mortmain, while the same judge, in *Bunting v. Marriott* ⁽⁷⁾, held that Tothill Fields Improvement Bonds were not. The judgment on this point is, however, very short, and the nature of these bonds does not very clearly appear, but it seems from the statement on page 164 of the Report that they were "bonds from the trustees of the Tothill Fields Improvements, to secure money borrowed by them on the credit of the rates." *Edwards v. Hall* ⁽⁸⁾ was the case of shares in an incorporated company, and Lord Cranworth there held that such shares were not within the Statute of Mortmain, apparently considering that the fact of the company being incorporated had a bearing on the question. There is, however, a distinction between the case of shares and bonds which was recognized by Lord

⁽¹⁾ 2 D. M. & G., 599.

⁽²⁾ 4 De G. & Sm., 402.

⁽³⁾ 10 Hare, 446.

⁽⁴⁾ Kay, 592.

⁽⁵⁾ 11 Beav., 507.

⁽⁶⁾ 28 Beav., 379.

⁽⁷⁾ 19 Beav., 163.

⁽⁸⁾ 6 D. M. & G., 74.

St. Leonards in *Myers v. Perigal* ⁽¹⁾. There may also well be distinctions between shares in one company and in another, though the number of the persons constituting each company would not affect the question. A partner in an ordinary company has no interest in land vested in the company within the Statute of Mortmain, and this may be said as to shares, whatever be the constitution of the company.

I have now substantially referred to all the authorities down to *Holdsworth v. Davenport* ⁽²⁾, before Vice-Chancellor Malins. The debenture in question there was that of a trading company, and *the case is open, therefore, [660 to the observations of Vice-Chancellor Wood in *Thornton v. Kempson* ⁽³⁾ as to the distinction between companies that are and companies that are not trading companies. The Vice-Chancellor, in *Holdsworth v. Davenport* ⁽⁴⁾, in commenting upon the case of *Gardner v. London, Chatham and Dover Railway Company* ⁽⁵⁾, which, as I collect, was in reality the foundation of his judgment, states that case to have “decided that a mortgage debenture made by a railway company in the form given in Schedule C. of the Companies Clauses Consolidation Act, 1845, does not give the debenture holder a specific charge upon the surplus lands of the company or the proceeds of the sale of them so as to entitle him to an order for a receiver of the sale moneys or interim rents.” In the case before him there was an assignment of “the undertaking called the Sheffield Waterworks, and all future calls on shareholders, and all the rents, rates, and sums of money arising by virtue of the several acts relating thereto, and all the estate, right, title, and interest of the company in and to the same until the sum of £2,275, together with interest for the same at the rate of £5 per cent., should be fully paid.” That form of security left the parties taking it in the same position as the debenture holders in *Gardner v. London, Chatham and Dover Railway Company*; but it is to be observed that in the latter case the form of the security given was such that, upon the true construction of the debenture, it did not give the holder the right which he was seeking in that case to have enforced. That was expressly held in the judgment of Lord Justice Turner ⁽⁶⁾, who put it entirely on that ground. And as to that the argument for the defendant has a strong bearing, that is, that necessarily, from the character of the undertaking and the nature of the security, it is not a fair con-

⁽¹⁾ 2 D. M. & G., 599.

⁽²⁾ 3 Ch. D., 185.

⁽³⁾ Kay, 599.

⁽⁴⁾ Law Rep., 2 Ch., 201.

⁽⁵⁾ Law Rep., 2 Ch., 220.

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struction of the instrument to hold that the parties were ever intended to be in a position to take the undertaking itself or anything but the fruit of the going concern; and that what the debenture holder in that case was proposing to do would have the effect of stopping the concern altogether. Those observations have an important bearing upon the question whether the principles of the decision in 661] **Gardner v. London, Chatham and Dover Railway Company* (¹), when applied to a case like this, would show that the holder of the security in this case would not have an interest in the land.

The decision of Vice-Chancellor Malins in *Holdsworth v. Davenport* (²) is unquestionably entitled to very great weight; but it seems to me that I cannot, consistently with the decisions of Lord Eldon in *Knapp v. Williams* and *Corbyn v. French* (³), followed, as they have been, by Sir William Grant in *Finch v. Squire* (⁴), and by the other eminent judges to whom I have referred, consider myself at liberty, if I were so inclined, to hold that the debentures in this case are not interests in or charges on land within the Statute of Mortmain. I must, therefore, hold them to be within that statute, and declare that they cannot be the subject of a charitable bequest.

Solicitors: *Barton & Pearman; Bolton, Robbins & Busk*, agents for *Howell & Morgan, Machynlleth; Norton, Rose, Norton & Brewer*.

(¹) Law Rep., 2 Ch., 201.

(²) 8 Ch. D., 185.

(³) 4 Ves., 480.

(⁴) 10 Ves., 41.

See 15 Eng. Rep., 242 note; 19 Eng. Rep., 104 note.

[4 Chancery Division, 665.]

V.C.H., Dec. 9, 1876.

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*In re WORMSLEY'S ESTATE.

HILL V. WORMSLEY.

[1876 H. 290.]

Will—Bequest of Leaseholds—Mortgage thereon—Locke King's Act (17 & 18 Vict. c. 113).

Leaseholds are not within Locke King's Act.
Solomon v. Solomon (¹) approved.

ADMINISTRATION ACTION. James Wormsley, who died in November, 1875, by his will, dated the 19th of April,

(¹) 88 L. J. (Ch.), 473.

1875, bequeathed to his son, Senior James Wormsley, two leasehold houses in North Street, Fulham Road, "subject to the mortgage debt secured thereon;" and he bequeathed to his daughter Mary, the wife of Jeffrey Hill, four leasehold houses in North Street aforesaid, "subject to the mortgage debt secured thereon;" and he then bequeathed his two remaining houses in North Street aforesaid to his son, Senior James Wormsley, and the plaintiff, Charlotte Ann Hill, equally as tenants in common. These last-mentioned leasehold houses were also subject to a mortgage, as to which the will was silent, and the only question in this action was whether the legatees took them subject to the mortgage, or were entitled to have it paid off out of the general personal estate of the testator.

**Cottrell*, for the plaintiff: The terms of Locke [666 King's Act, and particularly the expression "the heir or devisee to whom such land or hereditaments shall descend or be devised," show that it was not intended to apply to leaseholds. Moreover, it has been expressly decided that leaseholds are not within the act: *Solomon v. Solomon* ('). These mortgages ought accordingly to be paid out of the general personal estate.

Dickinson, Q.C., and *F. T. White*, for the defendant, who was the executrix of the testator: With the exception of the expression noticed by the other side, the whole of the act is in terms strictly applicable to leaseholds. The preamble recites that it is "expedient that the law whereunder the real and personal assets of deceased persons should be administered should be amended," and then the act provides what is to happen when "any person shall die seised of or entitled to any estate or interest in any land or other hereditaments." In the face of an expressed intention thus to alter the law, and considering that a leasehold is an estate or interest in land, the subsequent use of the words "heir or devisee," "descend or be devised" (which may well include a legatee and bequest of leaseholds), are not enough to show that the Legislature intended to alter the law as to one description of estate or interest in land, and at the same time to leave it unaltered as to another. Then the case of *Solomon v. Solomon* is not a direct decision that leaseholds are not within the act, for all that the Master of the Rolls there decided was that the mortgage debt in that case must be borne by the leaseholds and other residuary personal estate in proportion to their respective values. On the whole, we submit that Locke King's Act applies, and

(') 33 L. J. (Ch.), 473.

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that these legatees are not entitled to have this mortgage paid off out of the general personal estate of the testator.

HALL, V.C.: I consider that the decision of the late Master of the Rolls in *Solomon v. Solomon* was clearly a [667] decision that leaseholds are not *included in Locke King's Act. That has been the law for a long time, and I have no doubt that it has been acted upon in many cases. Moreover, looking at the act, I must say that I myself should, in the absence of that decision, have taken the same view. I desire, therefore, that it be understood not only that I follow the decision of the Master of the Rolls in *Solomon v. Solomon* (¹), but that I construe the act in the same manner as he did.

Solicitors: *S. P. Clare ; J. Letts.*

(¹) 83 L. J. (Ch.), 473.

See 7 Eng. Rep., 736 note.

Independent of a statutory provision a mortgage debt is primarily chargeable upon the personal estate of the mortgagor, and not upon the real estate mortgaged: *Lapp v. Lapp*, 16 Grant's (U.C.) Chy., 159.

As to statute in *Michigan*, see *Clark v. Davis*, 32 Mich., 154, 159.

In *Pennsylvania*: *Matter of Hirst*, 35 Leg. Int., 222.

As to the liability of the tenant of a life estate to keep down the interest

during such estate, see 7 Eng. R., 737 note; 16 Eng. R., 728 note; *Bidwell v. Greenshield*, 2 Abb. N. C., 427, 431.

So the taxes upon personalty, the income of which is given during life: *Holcombe v. Holcombe*, 29 N. J. Eq., 597, and see cases cited in note.

The rule in case of a gift of an annuity is different: *McComb's Case*, 4 Bradf., 151; *Booth v. Ammerian*, 4 Bradf., 129; *Swett v. Boston*, 18 Pick., 123; 29 N. J. Eq., 599, and cases cited in note.

[4 Chancery Division, 667.]

V.C.H., Nov. 27, 28, 29, 30; Dec. 4, 5, 6, 8, 1876: Jan. 15, 1877.

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[1873 H. 17.]

Manor—Rights of Common—Freeholders and Copyholders—Right of Lord to take and sell Marl—General Words in Conveyance—Injunction, Form of.

General words in a conveyance by the lord of a manor of (*inter alia*) a small parcel of land which had been copyhold and was afterwards surrendered to extinguish the copyhold tenure, *held* not to recreate rights of common.

The lord of a manor may take gravel, marl, loam, and subsoil in the waste, for his own use and for the purpose of sale, so long as he does not infringe upon the rights of the commoners.

On the question whether the loam is taken to such an extent as to interfere with right of common, the *onus probandi* is on the tenant and not on the lord as in the case of appurement.

THE plaintiffs were William and James Hall, and they, on the 17th of January, 1873, filed this bill on behalf of themselves and all others the freehold tenants of the manor

of Coulsdon, Surrey, and all other persons being owners of lands or tenements copyhold, or formerly freehold or copyhold, of the manor (except the defendant and except as to lands now already inclosed), and such of the tenants and owners as were thereafter alleged to have sold their commonable rights over such lands to the defendant, viz., Edmund Byron, the lord of the manor.

The object of the suit was to establish rights of common over a group of downs and commons in the above manor, and to obtain an injunction for their preservation. The plaintiffs resided in the *parish of Coulsdon, and [668 were, as to William Hall, the owners by purchase in the years 1863 and 1870, and as to James Hall, by conveyance of twenty-four acres, part of the property purchased by William Hall, of about 300 acres of land; and they claimed a right of common of pasture for commonable cattle and sheep levant and couchant. The manor was conterminous with the parish. Its extent was about 4,315 acres, of which about 400 acres were waste, and its commons, or alleged commons, consisted of Riddles Down (about seventy-seven acres), Farthing or Fairdean Down (about 126 acres), Kenley (about seventy-seven acres), and Coulsdon Common (about eighty-eight acres), and a heath and three greens, called Bradmore, Lacey, and Lion, and two acres of waste near to Lacey Green which the defendant claimed as being private property. The plaintiffs claimed to be by themselves and their predecessors in title ancient freeholders of the manor, and as such entitled to a right of pasturage over all the commons of the manor, and this right, if established, would, as the manor was within the radius of the Metropolitan Commons Act, prevent the inclosure of any part of those commons except by act of Parliament, or with consent of all persons accustomed to turn out upon the wastes; and they alleged that, without their consent, the defendant was making gradual encroachments on the commons, which, though of small extent when taken one by one, were of considerable gravity when taken together.

The defendant's case was, that no such right of common as that claimed by the plaintiffs existed in fact; that such right as existed was confined to owners of ancient copyhold tenements; that the plaintiffs had not made out their title as ancient freeholders, and that their rights as copyholders were confined to the common nearest to the tenement in respect of which the right was exercised, viz., Riddles Down, and, as to that down, was confined to about five and a half acres, and was limited to one sheep an acre; and further,

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that he had never yet interfered, and never intended to interfere, with the rights of the commoners without their consent.

The evidence, which was very voluminous and conflicting, extending from the Domesday Survey to the present time, and the arguments, are sufficiently referred to in the judgment.

669] **Joshua Williams*, Q.C., *H. Matthews*, Q.C., and *Whately*, for the plaintiffs, referred to *Betts v. Thompson*⁽¹⁾; *Warrick v. Queen's College, Oxford*⁽²⁾; *Swinerton v. Marquis of Stafford*⁽³⁾; *Swayne's Case*⁽⁴⁾; *Badger v. Ford*⁽⁵⁾; *Arlett v. Ellis*⁽⁶⁾; *Smith v. Earl Brownlow*⁽⁷⁾; Co. Litt.⁽⁸⁾; *Lloyd v. Earl Powis*⁽⁹⁾; *Arundell v. Lord Falmouth*⁽¹⁰⁾; *Musgrave v. Inclosure Commissioners for England and Wales*⁽¹¹⁾; *Taylor on Evidence*⁽¹²⁾; *Scriven on Copyholds*⁽¹³⁾.

Dickinson, Q.C., *Bristowe*, Q.C., and *Morshead*, for the defendant, referred to *Cheesman v. Hardman*⁽¹⁴⁾; *Cruise's Digest*⁽¹⁵⁾; *Scriven on Copyholds*⁽¹⁶⁾; *Sadgrove v. Kirby*⁽¹⁷⁾; *Shakespear v. Peppin*⁽¹⁸⁾; *Viner's Abridgment*⁽¹⁹⁾; *Smith v. Fetherwell*⁽²⁰⁾; *Betts v. Thompson*; and Statute of Merton (20 Hen. 3, c. 4).

J. Williams, in reply.

1877. Jan. 15. HALL, V.C., after stating the nature of the suit and the right which the plaintiffs sought to establish by it, continued:

The plaintiffs claim in respect of tenements which William Hall purchased in 1863, viz., a freehold estate known as Hayes and Roke Farm, comprising 133 acres, the greater part thereof being, as alleged by the bill, ancient freehold tenements held of the manor by three several quit rents, one of which was 5s. 10d. (the only one of the quit rents I need mention, as the plaintiffs' evidence has had reference only 670] to property subject to that quit *rent), and the residue thereof being, as alleged by the bill, formerly copyhold, but enfranchised in October, 1863, under the provisions of the Enfranchisement Acts.

(1) Law Rep., 6 Ch., 732, 739.

(2) Law Rep., 10 Eq., 105; 6 Ch., 716, 729.

(3) 3 Taunt., 91.

(4) 8 Rep., 63 a.

(5) 3 B. & A., 153.

(6) 7 B. & C., 346.

(7) Law Rep., 9 Eq., 241.

(8) 2 Inst., 85, 88.

(9) 4 E. & B., 485.

(10) 2 M. & S., 440.

(11) Law Rep., 9 Q. B., 162, 173.

(12) 5th ed., vol. i, p. 591.

(13) Vol. i, pp. 10, 11.

(14) 1 B. & A., 706.

(15) Vol. iii, p. 70.

(16) Vol. i, p. 375.

(17) 6 T. R., 483, 486.

(18) 6 T. R., 741.

(19) Vol. iv, 587, 588.

(20) 1 Freem., 190; 2 Mod., 6.

William Hall, in August, 1864, sold about twenty-four acres, part of the estate so purchased, to the plaintiff James Hall. That part did not comprise any of the enfranchised copyhold. William Hall made a settlement of other part of the estate, and retained about eighteen acres, which, the bill alleges, contained all or part of the enfranchised copyholds and part of the ancient freehold tenements, i.e., the tenements in respect of which the 5s. 10d. quit rent was paid. The claim of each of the plaintiffs for the freehold tenants (i.e., not including the freeholders by enfranchisement or the copyholders) is in respect of his being, as he alleges, the owner of part of the tenement in respect whereof the 5s. 10d. was and is payable, and to establish such ownership the plaintiffs have gone into voluminous evidence.

I may at once dispose of James Hall. He has failed to make out any case in respect of his twenty-four acres, and consequently cannot have any decree in his favor.

As to William Hall, after having heard lengthened and elaborate arguments, consisting of a most minute examination of parcels in numerous deeds, plans, surveys, and other documents, and after having myself devoted a great deal of time to the investigation of this part of the case, I have come to the conclusion that he has made out that he is the owner of a small parcel of the property out of which the 5s. 10d. is issuing, and that this entitles him to maintain the bill on behalf of the freehold tenants. In the course of the argument the plaintiffs' counsel were obliged to vary their mode of identification, and the plaintiffs' case was certainly, during the greater part of the trial, in a most confused and unsatisfactory condition, occasioned mainly by the descriptions in the bodies of, and schedules to, certain deeds (dated in 1834 and 1839), being supposed to show or indicate a different source of title to that part of the eighteen acres which, it was contended, was subject to the 5s. 10d., than the source of title to the property subject to that rent. This was, I consider, to a considerable extent, cleared up by the discovery and production, during the trial, of an early title deed—I mean the deed of the 1st of May, *1792; and [671 although there is, no doubt, embarrassment arising from the descriptions in the deeds of 1834 and 1839, the latter of which, at least, is carelessly framed, the copyholds being described along with and as part of the freeholds, and again described as copyholds, I am satisfied that the supposed discrepancies may be accounted for by considering that the descriptions “Sandy Field” and “part of Sandy Field” occurring in those places which it is said displace William

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Hall's case, are either errors or are to be referred to other lands having acquired a similar name to that of other land which he is the owner of, and claims title to, as part of the property subject to the 5s. 10d.

William Hall has, I think, also established his title to a small piece of freehold land which was enfranchised under the Copyhold Enfranchisement Act, and I hold that he is entitled in respect of such land to maintain this suit on behalf of himself as owner of land formerly copyhold, and on behalf of other persons who were copyholders and have enfranchised in like manner, and of the owners of land copyhold of the manor. He has sought to maintain the suit as owner of a farm called Old Lodge Farm, which he purchased from the defendant in the year 1870. A small part of this was copyhold; it was surrendered so as to extinguish the copyhold tenure; it was not enfranchised under the Copyhold Enfranchisement Act. When William Hall purchased this farm it had no right of common appendant or appurtenant. The conveyance to him conveyed the farm and whatever would pass by such conveyance under the general words, which were, "Together with all houses, out-houses, edifices, buildings, fixtures, barns, stables, yards, gardens, orchards, roads, ways, paths, passages, waters, watercourses, hedges, ditches, fences, lands, meadows, feedings, commons and all commonable rights, timber and other trees, woods, underwoods, liberties, advantages, rights, members, and appurtenances whatsoever, actual and reputed, to the said messuages, lands, hereditaments, and premises hereinbefore conveyed or intended so to be belonging or in anywise appertaining therewith or with any part thereof, held, used, and enjoyed, and all the estate, right, title, trust, use, inheritance, interest, property, possession, benefit, claim, and demand whatsoever, both at law and in equity, of 672] him the said Edmund Byron, *or in, to, or out of the same messuages, lands, hereditaments; and premises, and every part thereof." It was contended that by these words a right of common was created. There was evidence of enjoyment several years previously to the date of the conveyance of common right with this farm; but there was no evidence of enjoyment or reputation at the date of the conveyance, not even the occupier at that time being called; and I have not been able to come to the conclusion that, by means of the general words in question, common rights were recreated. Several cases were referred to by the plaintiffs' counsel as authorities that such common rights were recreated, but they were cases of a special character, being

cases under Inclosure Acts, and it has been considered in some of those cases that the decisions are to be referred to the special character and provisions of such acts. There are many cases upon the construction of deeds which were not referred to, but which are authorities adverse to the plaintiffs' contention. Of these I may mention *Bradshaw v. Eyre* ⁽¹⁾, *Worledge v. Kingswell* ⁽²⁾, *Clements v. Lambert* ⁽³⁾, and *Marsham v. Hunter* ⁽⁴⁾. It seems significant that the words "or heretofore or at any time heretofore," which are part of the general words given by Mr. Davidson in his ordinary form of a conveyance, are left out in a case where they were specially appropriate if it was intended to recreate rights of common.

The plaintiff, William Hall, has gone into evidence to establish a right to common as a freeholder in respect of other freehold lands, but in the bill the issues were limited to the lands specifically mentioned, and I thought, and still think, that if a plaintiff, in a case like the present, states, as I think he did, "I am suing in respect of certain specified lands," he should not go into evidence as to other lands. The defendant has a right to learn from the bill, or, where the bill is not distinct, from particulars obtained by him, to what particular lands he must address his defence and evidence.

The defendant has contended that the rights of common were limited in several ways: one limitation was that there was to be only one sheep per acre; another was that each tenant could turn *out only on the common adjoining his tenement or connected with such common by a road connecting the two commons; and, further, that the right of common was limited to sheep. I think all these contentions failed. There is evidence sufficient to establish here the ordinary rights of common of pasture; and the evidence to the contrary is all to be referred to arrangements made for mutual convenience, it not having the effect of permanently qualifying in law the actual rights. And as regards sheep only having generally been turned on, that is accounted for by the character of the herbage on the common.

The bill states that several inclosures have been made by the defendant, and it asks that he may be restrained from suffering to remain or be inclosed any part of the common. By the answer it appeared that several of these inclosures were made under arrangements with tenants, the defendant having transferred, or, as to one of them, agreed to transfer

⁽¹⁾ Cro. Eliz., 570.

⁽²⁾ Cro. Eliz., 794.

⁽³⁾ 1 Taunt., 205.

⁽⁴⁾ Cro. Jac., 253.

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to them his estate and interest and the inclosures having been made by the tenants. As to one of these (Lion Green), it appeared to have been inclosed after the institution of the suit, and the plaintiffs then amended their bill by limiting the relief they had asked to inclosures in the possession or power of the defendant. This amendment excludes four or five inclosures, leaving still within the relief asked the following inclosures: first, a strip of land adjoining a new road made by the defendant across one of the commons. In the bill this land is stated to be nine acres. In the answer it is stated to be 4A. 0R. 28P.; secondly, a piece of land, part of Lacey Green, containing twelve perches; and, thirdly, a few roods annexed to several cottages. As to these three inclosures, I do not think that the second and third are of sufficient importance to require me to deal with them. The first was inclosed early in 1872, about a year before the suit was instituted, and I should here mention that the plaintiffs' bill, as originally filed, charged the defendant with having made inclosures to a very much larger extent, viz., about fifty acres of the common adjoining the plaintiffs' land and the whole of another common, which charge was struck out on the answer coming in. I do not think a decree of restitution in respect of so small a quantity of land as the strip of land above mentioned would have been sought for had [674] not the greater claim *been thought to exist and been put forward in the first instance; and, indeed, the plaintiffs' counsel said, what occasioned the suit was the inclosure of Lion Green and the taking of loam. As regards the strip in question, it is, no doubt, valuable to the defendant and to the person to whom he agreed to sell his interest in one of the five pieces above mentioned, on account of its frontage to the new road. On the other hand, it would not, if now thrown open so as to be commonable, be of much, if any, use to the commoners. As regards William Hall individually, he is so far from it that it would not be of any specific use to him, nor do I think it would materially indirectly benefit him by its being available for other commoners; and, considering that the defendant, mainly at his own expense, made the new road, which I do not doubt is a great improvement, from which all the commoners directly or indirectly derive benefit, and that the road has been taken to by the parish, I do not feel called upon to grant a mandatory injunction in respect of it, although the defendant has not, the *onus probandi* resting with him, established his title to it as being valid. To compel the restitution of this would, I think, under all the circumstances, be harsh, and I do not

believe that the commoners, certainly not as a body, wish, and I doubt whether any one of them, except the plaintiffs, wishes such a restitution. I say this after considering the evidence of those commoners who have stated that they approve of the plaintiffs' proceedings to prevent inclosures and taking loam.

The bill further asks for an injunction to restrain the defendant from cutting, digging, and removing the turf, soil, and subsoil of the commons, to the prejudice of the commonable rights over the same of the plaintiffs and the other persons on whose behalf they sue. The bill alleges that the defendant has caused to be dug on many parts of the common, and particularly on Coulsdon Common, large quantities of gravel, loam, and similar substances, and has caused the same to be sold at 10s. per cart-load, and has also recently caused to be cut or stripped off large portions of the turf on the common called Riddles Down, and that (this applying to as well the inclosures as the digging) the plaintiffs and those they represent have already, by the defendant's acts, to a great extent been deprived of and impeded in the exercise of their commonable *rights over the [675 commons, and unless the defendant be restrained from continuing to do such acts as aforesaid, they will be entirely debarred from the exercise of their said rights.

The plaintiffs' counsel contended before me that a lord of a manor has no right to get or cut at all, or if at all, not for sale, turf, or loam, or subsoil, arguing that his so doing would be destructive of and repugnant to his grant, and therefore illegal. As regards gravel, however, no claim was made, the plaintiffs' counsel saying this was not open to the same objection as turf, loam, and subsoil; but it does not appear to me that the lord's right to get gravel is, from the nature of the thing, different from that of getting loam, turf, and subsoil, except in this respect, that the right to get gravel so as permanently to destroy the herbage would ordinarily be less admissible than that of getting loam, turf, and subsoil, which is only temporarily detrimental to the tenants.

The law I consider to be that the lord may take gravel, marl, loam, and the like, in the waste, so long as he does not infringe upon the commoners' rights, his right so to do being quite independent of the right of approvement under the Statute of Merton or at Common Law, and existing by reason of his ownership of the soil, subject only to the interests of the commoners. Bayley, J., in *Arlett v. Ellis* (1) said,

(1) 7 B. & C., 369.

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“The lord has rights of his own reserved upon the waste; I do not say subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common, and to every benefit to be derived from the soil, not inconsistent with the rights of commoners. And when it is ascertained that there is more common than is necessary for the cattle of the commoners, the lord, as it seems to me, is entitled to take that for his own purposes.”

That the lord may get gravel, &c., as above mentioned, was laid down by Lord Kenyon in *Bateson v. Green* ⁽¹⁾. In that case the lord was held entitled to dig clay pits, he selling the clay, and that although it was proved that there was not a sufficiency of common, as claimed by the tenants: the lord had in that case always dug the common when, where, and in what manner he pleased. In *Arlett v. Ellis*, in which it was held that a custom for the lord of the manor to inclose [676] the waste without limitation *or restraint was bad in point of law, but that a custom for him to inclose parcels of the waste, leaving a sufficiency of common, was good, even against common of turbary. Bayley, J., referred to *Bateson v. Green* ⁽²⁾, saying that the extent to which the right of digging clay had been carried in that case, did not appear to be unreasonable, and that Lord Kenyon, in delivering judgment, intimated that there was no evidence to show that the right had been more exercised of late years than formerly, and he said that it was not unreasonable that the lord should reserve the right of taking marl or limestone, it being not a permanent depriving of the tenant of the benefit derived from the surface of the land.

In reference to *Bateson v. Green*, Lord Cottenham said, in *Hilton v. Earl of Granville* ⁽³⁾, “There are very strong authorities in support of the plaintiffs’ proposition, and there are others which appear to me to be quite irreconcilable with the principle laid down in those cases. No doubt the modern cases are in favor of the plaintiffs. *Bateson v. Green* is the strongest case against him, and is not expressly overruled in any of the subsequent cases, though attempts have been made—a practice often resorted to, and perhaps not always productive of good—to reconcile that decision with the others to which the courts have come. I find, however, these very contrary decisions, and I find the well-known and established rule of copyhold law, that in the case of opening mines, and in the case of timber, at least, there is nothing inconsistent in a custom which derogates from the grant. It is quite impossible to say, in the case of

⁽¹⁾ 5 T. R., 416.⁽²⁾ 5 T. R., 411.⁽³⁾ Cr. & Ph., 283, 293.

the common and ordinary copyhold grant of land, nothing specific passing between the parties, that the custom to enter on the land and cut down all trees is not a derogation from the grant, if you look at the nature of the grant and the terms used in it: the custom, however, overrides the grant, and the grant is taken subject to the custom; so that there is nothing inconsistent, unless there be something unreasonable, and therefore illegal, in the custom. Now it is perfectly well established that a custom is good which authorizes the lord to come on his copyhold land to open a shaft and work a mine: it may be destruction to the copyhold, but if the custom is proved, it is a good custom. So it is a good custom for the lord, after having granted land with the *timber growing on it, to enter on the land and to cut down the timber: if there is no custom, neither the landlord nor the tenant can cut down the timber: if there be a custom in favor of either the one or the other, the right exists, and the law will protect the exercise of that right. As a general proposition, therefore, that there can be no custom which derogates from the grant, I apprehend all the authorities, and the well-known law on the subject of timber and mines, show that the principle cannot be carried to that extent. *Bateson v. Green* ⁽¹⁾ undoubtedly is a striking instance to the contrary."

Lord Denman in his judgment in *Hilton v. Earl of Granville* (when at law ⁽²⁾), said ⁽³⁾: "The greatest reliance, however, was placed on some decisions in which a custom derogatory to the lord's oral grant has been holden valid. *Bateson v. Green* is the strongest of these cases, where the lord of a manor defended himself successfully against a commoner whose extent of common he had curtailed by taking clay, on proof that the lord had constantly done so. The language of Lord Kenyon is certainly large, though considered by Bayley, J., in *Arlett v. Ellis* ⁽⁴⁾, to be subject to some restriction. If, indeed, it must be taken to import that a lord, after granting rights of common, may help himself to any portion of the common land to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported in principle. The two decisions in the notes to *Bateson v. Green* are much more cautiously worded; and in that of *Folkard v. Hammett* ⁽⁵⁾ Lord Chief Justice De Grey expressed himself conformably to what we consider the true legal principle: 'The defen-

⁽¹⁾ 5 T. R., 411.

⁽²⁾ 5 Q. B., 701.

⁽³⁾ 5 Q. B., 729.

⁽⁴⁾ 7 B. & C., 346.

⁽⁵⁾ 5 T. R., 417.

dants justify under the usage. I will not call it a custom, because I look on it as a reserved right of the lord'; and assuredly whatever the lord can reasonably be supposed to have reserved out of his grant the usage may adequately prove that he did reserve. But a claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of [678] the thing *granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument;" but what is there said as to an actual grant being produced was overruled in *Rowbotham v. Wilson* ⁽¹⁾, and see the judgments of Lord Hatherley and Lord Chelmsford in *Duke of Buccleuch v. Wakefield* ⁽²⁾, the latter saying: "Even then, if *Hilton v. Earl of Granville* ⁽³⁾ is an authority that where there is nothing to show for the right but a customary exercise of it, the custom cannot be supported (which, I think, is open to question), yet the *dictum* of Lord Denman in that case, that a grant in specie to the effect of the custom could not be supported, has been since overruled."

It is not necessary for me to say in the present case whether or not *Bateson v. Green* ⁽⁴⁾ is a sufficient authority for the proposition that the lord may by custom get clay, although he thereby does not leave sufficient common, because it is not established in evidence that the plaintiffs' rights, or those of any other commoner, have been in any way interfered with by the digging or cutting of loam, gravel, or subsoil. I may, however, refer to the case of *Marquis of Salisbury v. Gladstone* ⁽⁵⁾, in which copyholders set up a custom to dig clay without limit out of their copyhold tenements for the purpose of making it into bricks to be sold off the manor, which was held a good custom, Lord Cranworth saying: "In truth, I believe that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom;" and Lord Chelmsford referred to *Bateson v. Green* without disapproval; and in

⁽¹⁾ 8 H. L. C., 348.

⁽²⁾ Law Rep., 4 H. L., 399, 410.

⁽³⁾ 5 Q. B., 701.

⁽⁴⁾ 5 T. R., 411.

⁽⁵⁾ 9 H. L. C., 692, 701.

Lingwood v. Gyde ⁽¹⁾ Willes, J., said that a customary right to waste both commissive and permissive was established to be good in law by the decision in *Marquis of Salisbury v. Gladstone*.

*The plaintiffs' counsel, in support of his argument, [679 relied on *Wilson v. Willes* ⁽²⁾, where Lord Ellenborough held that the tenants could not claim an unlimited right to cut turf to ornament their gardens; that is, that such a custom would be bad in law. That case no doubt will be important to be considered when a case like *Bateson v. Green* ⁽³⁾ comes before the court, and it has to be determined whether or not it is to be followed, regard being had to all the subsequent decisions bearing upon it. Mr. Joshua Williams, in his very able argument, stated that *Wilson v. Willes* was the case of the tenants, and not of the lord, but that the same principle was applicable. If the same principle be applied, then it would have to be considered whether or not the lord may not establish a right involving total destruction of the thing granted as the tenants did in *Marquis of Salisbury v. Gladstone* ⁽⁴⁾. However, I do not, as at present advised, accept without question the proposition that the same principle is applicable. It may be that the lord being the grantor cannot establish, as a reservation out of his grant, that which in the absence of production of the grant itself is plainly unreasonable, and, therefore, should be referred to accident or indulgence, and not to any right conferred in ancient times.

Although the plaintiffs have not established by evidence that the right of common has been interfered with by the digging or cutting of loam, turf, or subsoil, it may be that they are entitled to an injunction in respect of such digging or cutting, qualified as the injunction was in the *Commissioners of Sewers of the City of London v. Glasse* ⁽⁵⁾, i.e., so as to prevent the exercise of the right of common. It appears to me that it is sufficiently alleged by the bill that the defendant will, unless restrained, dig and cut loam and turf so as to interfere with the right of common, and that the defendant's statement in his answer, to the effect that he does claim a right to dig, without interference by the plaintiffs (I think this means as owner of ancient freehold), or any persons other than the owners of ancient copyhold tenements, the rights of freeholders being here denied, entitles the plaintiffs to a qualified injunction: as to this

⁽¹⁾ Law Rep., 2 C. P., 77.

⁽²⁾ 7 East, 121.

⁽³⁾ 5 T. R., 411.

⁽⁴⁾ 9 H. L. C., 692, 701.

⁽⁵⁾ Law Rep., 19 Eq., 134.

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Hall v. Byron.

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I may refer to the case of *Hext v. Gill* ⁽¹⁾, where the defendant *denied having any present intention, but claimed the right, and the court granted the injunction. The defendant does not by his answer claim to be entitled to dig and cut loam and turf, not leaving sufficient of the wastes for the commoners, which if it had been claimed would have required me (had there been evidence establishing that the defendant had exercised such alleged right) to say whether or not *Bateson v. Green* ⁽²⁾ is or is not to be followed. I should add that I do not think there is ground for the suggested distinction that the lord cannot dig or cut for the purposes of sale. In reference to this question of right, I consider the *onus probandi* is on the tenant, and not, as in the case of approvement, on the lord. The *onus probandi* being on the lord in the case of approvement, would seem to arise from this, that the lord having made a grant over the whole waste, his right to inclose is treated as a right conditional upon his establishing that there is sufficient waste left for the tenant to enjoy the right of common granted, whereas as regards the lord's getting marl, that is, by virtue of his ownership of the soil, subject only to the tenants complaining, if they can establish their complaint, of his unduly availing himself of his ownership of the soil, just as the tenants may complain that the lord turns too many beasts on to the common, in which case the *onus probandi* would be on them.

I have now dealt with all the questions which have arisen in this case, and which are, in my opinion, material to be dealt with. The decree will be according to the minutes which I have sketched.

This is a case in which I consider it right not to give costs to either of the parties. In *Belts v. Thompson* ⁽³⁾ the Lord Chancellor varied the decree of the Master of the Rolls by not giving the plaintiff costs. I do not say that the present case is similar in all respects to that, but I consider neither party should, under all the circumstances of this case, pay costs to the other.

MINUTES OF DECREE :—Declare that the plaintiff William Hall, as owner of part of the lands within the manor of Coulsdon, out of which a quit rent of 5s. 10d. is payable, and as owner of lands and tenements which were copyhold of 681] *the said manor and have been enfranchised under the Copyhold Enfranchisement Acts, and the other freehold tenants of the said manor, and the other owners of lands and tenements which were copyhold held of the said manor and have been enfranchised as aforesaid, and the copyhold tenants, except such persons as the plaintiffs in their bill except from the persons on whose behalf they sue, are entitled, in right of and as appendant or appurtenant to their several lands and tenements held of the said manor, to a right of com-

⁽¹⁾ Law Rep., 7 Ch., 699.

⁽²⁾ 5 T. R., 411.

⁽³⁾ Law Rep., 6 Ch., 732, 739.

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mon of pasture upon all the waste lands of the said manor for all manner of cattle levant and couchant upon their respective lands within the said manor; and let the plaintiff William Hall, and the other persons entitled as aforesaid, be quieted in the possession and enjoyment of their said rights.

Injunction to restrain defendant, his agents and workmen, from inclosing any part of the said waste lands now uninclosed, and from carrying away or destroying the loam or soil of the said waste lands now uninclosed, or the pasture or herbage being or growing thereon, so as in any manner to prevent, disturb, or interfere with the exercise by the plaintiff William Hall or the other persons entitled as aforesaid, or any of them, of their said rights hereinbefore declared in and over the said waste lands now uninclosed.

Solicitors: *Horne & Hunter*, agents for Samuel Potter, Cheapside; *E. & H. Tylee*; *Wickham & Moberly*.

[4 Chancery Division, 682.]

C.J.B., Jan. 15, 1877.

**In re JACKSON. Ex parte HALL.* [682]

Bill of Sale—Registration—Act of Bankruptcy—Assignment of whole Property to secure Existing Debt and Fresh Advance—Agreement not to register, but that new Bill of Sale should be given when required by Grantee—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36).

A trader gave to one of his creditors a bill of sale of all his property to secure a then existing debt and a fresh advance. It was verbally agreed that the bill of sale should not be registered, but that the grantor should give a new bill of sale in substitution for the first when required to do so by the grantee. More than two months before the grantee filed a liquidation petition a new bill of sale was given, and was registered, and the grantee put a man in possession of the property. But the grantor's name remained on the premises as the ostensible occupier of them:

Held, that, there having been a sufficient fresh advance when the first bill of sale was given, the substituted bill of sale was good as against the trustee in the liquidation.

Ex parte Cohen ⁽¹⁾ and *Ex parte Stevens* ⁽²⁾ distinguished.

THIS was an appeal from a decision of the judge of the Poole County Court.

John Jackson was the proprietor of some billiard rooms at Bournemouth: Prior to the 16th of May, 1876, W. J. Hall had advanced him several sums of money, amounting in the whole to £45, of which there then remained due the sum of £39 15s. On the 16th of May he applied to Hall for a further loan, which Hall declined to make unless Jackson would give him some security for the existing debt, as well as the fresh advance. Jackson agreed to give a bill of sale of the furniture and effects belonging to him at the billiard room, which was in fact the whole of his property. He requested Hall not to register the bill of sale, and Hall promised that he would not, but Jackson promised that, if Hall should at any time require another bill of sale in place

⁽¹⁾ Law Rep., 7 Ch., 20.

⁽²⁾ Law Rep., 20 Eq., 786.

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of the first, he would give it. The bill of sale was executed on the 29th of May, 1876, and by it Jackson assigned the property in question to Hall to secure the repayment of £60, Hall making him a fresh advance of £20 5s. This bill of sale was not registered. Hall afterwards applied to Jackson to execute another bill of sale of the same property, 683] *and Jackson did so on the 3d of July, 1876. This bill of sale was registered on the 6th of July, 1876. On the 24th of July Hall put a man in possession of the property; Jackson's name, however, remained over the door of the billiard rooms. On the 27th of September Jackson filed a liquidation petition, under which, on the 14th of October, H. Pratt was appointed trustee. He applied to the county court for an order to set aside the bill of sale as fraudulent against him.

The judge ordered it to be set aside.

Hall appealed.

Pollard, for the appellant: The bill of sale is not an act of bankruptcy, for it was given in pursuance of the agreement entered into when the fresh advance was made: *Harris v. Rickett*⁽¹⁾; *Ex parte Fisher*⁽²⁾; *Mercer v. Peterson*⁽³⁾; *Lomax v. Buxton*⁽⁴⁾.

Oswald, for the trustee: No fresh advance was made when the second bill of sale was given, and that is the bill of sale which has been set aside. The first bill of sale was void as against the trustee, because it was not registered. No possession was taken sufficient to satisfy the requirements of the Bills of Sale Act. The parol agreement cannot help the title of the appellant: *Ex parte Cohen*⁽⁵⁾; *Ex parte Stevens*⁽⁶⁾.

BACON, C.J.: The argument on behalf of the respondent is, that the execution of the bill of sale in July was an act of bankruptcy. Now the debtor owed his creditor £40, and he received from him a fresh advance of £20, and in consideration of that advance he gave the first bill of sale for the old and the new debts. That new advance was a sufficient equivalent. Then there was a stipulation that the bill 684] of sale should not be registered, and that a new bill *of sale should be given when the creditor required it. Was that an unlawful agreement? It bears no resemblance whatever to that which was done in *Ex parte Cohen*⁽⁵⁾ and *Ex parte Stevens*⁽⁶⁾ for the purpose of evading the wholesome

⁽¹⁾ 4 H. & N., 1.

⁽²⁾ Law Rep., 7 Ch., 686.

⁽³⁾ Law Rep., 2 Ex., 304; Law Rep., 3 Ex., 104.

⁽⁴⁾ Law Rep., 6 C. P., 107.

⁽⁵⁾ Law Rep., 7 Ch., 20.

⁽⁶⁾ Law Rep., 20 Eq., 786.

provisions of the Bills of Sale Act by means of a connivance between the debtor and the creditor. The creditor could at any time have enforced the performance of the agreement to give a new bill of sale; he would have been entitled to have it specifically performed. It was a perfectly lawful agreement. Then, in July, the creditor did exercise his right, and the debtor readily complied. A new bill of sale was given in July, and it was duly registered. It was a perfectly valid bill of sale, and was not an act of bankruptcy. In the same month of July the creditor took possession of the property. There was no appearance of bankruptcy then, and when the bankruptcy did come the property was in the actual possession of the creditor under the provisions of the bill of sale. Unless the original bill of sale was an act of bankruptcy, or the second bill of sale was an act of bankruptcy, there can be no objection to the transaction. The cases cited are quite consistent with the conclusion to which I come, that the bill of sale of July is valid, because it was given in performance of the prior valid agreement. The order of the county court must be discharged.

Solicitors for appellant: *Lumley & Lumley*.

Solicitors for respondent: *Neal & Philpot*, agents for J. Robinson, Bournemouth.

[4 Chancery Division, 685.]

C.J.B., Jan. 29, 1877.

**In re PRYCE. Ex parte RENSBURG.* [685]

Reputed Ownership—Chose in Action—Debenture of Company—Indorsement in Blank—Equitable Assignment—Notice to Company—Debts due to Bankrupt in the Course of his Trade—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, subs. 5.

A debenture of a joint stock company, by which the company undertake to pay a sum of money, with interest, and charge their undertaking and property with the payment thereof, is a *chose in action* within the meaning of sect. 15, sub-sect. 5, of the Bankruptcy Act, 1869.

An assignment of such a debenture by indorsement in blank confers a good title on the assignee as against the trustee in bankruptcy of the assignor, notwithstanding that the assignee gives no notice to the company until after the commencement of the bankruptcy.

The words "debts due to the bankrupt in the course of his trade" in sect. 15, sub-sect. 5, of the Bankruptcy Act, 1869, do not extend to all debts due to the bankrupt during the period of his trading, but include only debts connected with the trade.

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A.

ABATEMENT OF PRICE.

See VENDOR AND VENDEE, 691, 696 *note*.

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See CRIMINAL LAW, 370, 372 *note*.

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ADMIRALTY.

1. *Collision*. During a very violent gale a brig adrift in the Tyne drove down on a steamer which was lying

properly moored to mooring buoys placed there by the harbor authorities. On the brig striking the steamer the ring of one of the buoys carried away, and the steamer got adrift, and drove down the river, and ultimately came in contact with and did damage to a bark, whose owners instituted a cause of damage against the steamer in the county court of Northumberland, to recover for the damage done to their vessel by the steamer.

At the hearing it was proved that the chain cables of the steamer had been unbent at the time she got adrift, and that no look-out had previously been kept on deck, though it was known that the weather was getting worse :

Held, on appeal, affirming the decision of the court below, that a defence of inevitable accident, set up by the owners of the steamer, was not sustained, and that the steamer was alone to blame for the collision. *The Pladda*, 573

2. The steamer C., coming into the St. Katharine's Docks, fell against two barges, and drove them against a vessel called the V., which was lying alongside the St. Katharine's Wharf; a skiff was between the V. and the wharf, and in such a position as not to be visible to those on board the C. By reason of the C. falling against the barges the V. was driven towards the wharf, and crushed the skiff against the wharf. At the time of the collision the C. was within the prescribed limits within which the jurisdiction of the dock-master extended, and she was coming into dock under the direction

of the dock-master. A cause of damage was instituted in the City of London Court on behalf of the owner of the skiff and the owners of her cargo against the owners of the C. to recover for the damage done to the skiff and her cargo :

Held, on appeal (reversing the judgment of the court below), that the accident might have been avoided if the master of the C. had taken proper precautions in entering the dock, and that the C. must be condemned in the damage proceeded for. *The Cynthia*. 582

8. *Demurrage*. Defendants chartered plaintiffs' ship to carry a cargo of rice to a good and safe port, calling at another port for orders which were to be forwarded within forty-eight hours after notice of her arrival or lay-days to count. Twelve working laying days to be allowed the freighters for loading the ship at port of loading and waiting for orders at port of call, and fifteen days on demurrage allowed over and above the laying days, at 4*d.* per ton per day. It was further agreed "that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise." The ship arrived at the port of call with a cargo worth the freight, and notice was given to the defendants.

In an action against the charterers (who had sold the cargo before arrival at the port of call) two breaches of contract were assigned: 1, that the defendants did not give orders as to the ship's port of discharge; 2, that they gave orders for the ship to discharge at a port which was not a good and safe port; whereby the plaintiffs were delayed and put to expense in obtaining payment of the freight:

Held, affirming the judgment of the Common Pleas Division, that the exoneration clause discharged the defendants from liability for the breaches. *French v. Gerber*. 507

4. *Freight*. On the 1st of December, 1874, M., the owner of a ship, then at San Francisco, mortgaged it to the plaintiffs for £7,500 and further advances. On the 2d of December, the captain procured a cargo of wheat "on

account of the ship," which cargo was consigned to the order of the shippers under bills of lading stating the freight payable on delivery to be 1*s.* per ton, and the shippers drew bills on M. for the price at sixty days' sight, which were attached to the bills of lading, and were accepted by M. The ordinary freight at this time was 55*s.* per ton. In pursuance of previous arrangements, the defendants advanced to M., on the 4th of January, 1875, £3,000, and on the 22d of February a further sum of £9,000, on the security of the cargo, to meet the bills of exchange, it being arranged that they should sell the cargo and receive the proceeds on M.'s account. On the 19th of February the defendants and M. sold the cargo to J. & Co. for 43*s.* 6*d.* a quarter, the contract stating, "as cargo is coming on ship's account, freight is to be computed at 55*s.* per ton." The bills of exchange were met by M. with the money advanced by the defendants, and on the 26th of February M. handed to them the bills of lading (indorsed by the shippers), and assigned to them the freight as at 55*s.* per ton. When the ship arrived, the plaintiffs took possession of her, and claimed payment of freight at 55*s.* per ton:

Held, that as the property in the goods remained in the shippers, the contract for 1*s.* freight was valid; but that there was no contract for freight at 55*s.*, and that the 55*s.*, though called freight, was, in fact, part of the purchase-money; and, therefore (reversing the judgment of the Common Pleas Division), that the plaintiffs, as mortgagees of the ship, were entitled to 1*s.* freight only, and not to 55*s.* *Keith v. Burrows*. 487

5. *General average*. A ship sailed well equipped and manned for the voyage, having a donkey engine on board and a reasonable supply of coals to work it for pumping purposes. The ship met with very heavy weather and sprang a leak, and in order to keep her afloat, it became necessary to use the engine for pumping, and the coals running short, the captain burnt with the coals the ship's spare spars and some of her cargo:

Held, that the sacrifice of the spars and cargo was general average. *Robinson v. Price*. 354

6. *Salvage*. A cause of distribution of salvage was instituted on behalf of some of the crew of a steamship against the owners of the steamship. The owners of the steamship appeared to defend the suit, and in their statement of defence, alleged in effect that, subsequently to the salvage services, but before any amount had been paid in respect of such services, fourteen of the plaintiffs had by deed, in consideration of sums varying from £1 to 10s. paid them by the defendants, assigned to the defendants all their respective shares of salvage reward. The plaintiffs demurred to the paragraphs of the statement of defence containing these allegations.

The court sustained the demurrer.
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JURISDICTION, 446.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

1. Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either.
2. In such a case the word "approved" written by one of the parties at the end of the draft agreement must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form.
3. B. had for some years supplied the M. Railway Company with coals. At last it was suggested by B. that a contract should be entered into between them. After their agents had met together the terms of agreement were drawn up by the agent of the M. Company and sent to B. B. filled up certain parts of it which had been left in blank, and introduced the name of the gentleman who was to act as arbitrator in case of

differences between the parties, wrote "approved" at the end of the paper, and signed his own name. B.'s agent sent back the paper to the agent of the M. Company, who put it in his desk, and nothing farther was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper, coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the M. Company, there were explanations and excuses given by B., and the "contract" was mentioned in the correspondence, and matters went on as before. Finally disagreements arose, and B. denied that there was any contract which bound him in the matter:

Held, that these facts, and the actual conduct of the parties, established the existence of such a contract, and there having been a clear breach of it B. must be held liable upon it.

4. B. was the chief partner in a partnership of three persons. The word "approved" written by him and signed with his name was treated as an assent binding on all the partners (whose names were mentioned in the paper), although the usual form of signature of the partnership was that of "B. & Sons."
5. A mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon those terms, by sending coals in the quantities and at the prices mentioned in it, amounted to sufficient to show the adoption of the writing previously altered and sent, and to constitute it a valid contract.
6. *Per LORD BLACKBURN*: The onus of showing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance. *Brogden v. Metropolitan Railway*. 171, 199 note.
7. That debts due to stockbrokers shall be first paid, invalid. *Ex parte Saffery*. 758

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APPEARANCE.

1. A collision took place at sea, about ten miles from the South Stack Light House, between an American and a Spanish vessel. Both vessels sunk in consequence of the collision, and the owners of the American vessel applied in the registry for leave to issue a writ for service out of the jurisdiction in an action to recover compensation for the loss of their vessel, against a British subject resident in Spain, who was alleged to be one of the owners of the Spanish vessel. The Registrar having granted the necessary leave, the writ was issued and service was effected on the defendant in Spain. Thereupon an appearance under protest was entered on his behalf. Afterwards, on these facts being brought before the judge of the Admiralty Court, on motion, the court ordered the action to be dismissed:

Held, on appeal, that the order was right.

2. A defendant in an admiralty action desiring to object to the jurisdiction of the court, may enter an appearance under protest, in accordance with the practice in force in the High Court of Admiralty before the coming into operation of the Judicature Acts. *The Viva*. 572

APPOINTMENT.

See POWER, 778.

ARREST.

1. In an action for false imprisonment, defendant set up as a defence that he had had no notice of action, to which he was entitled under s. 113 of 24 & 25 Vict. c. 96: for that he had caused plaintiff to be arrested under s. 103, believing he had found her committing a felony. The jury found that plaintiff had not committed the felony, but that defendant *bona fide* believed, and on reasonable grounds, in the existence of facts which would have justified him in acting as he had done. On this finding the verdict was entered for defendant. Plaintiff had not been apprehended on the spot where defendant believed he had found her committing the felony, and the question, whether or not she had been "immediately apprehended," had not been left to the jury:

Held, that this was a question of fact for the jury which ought to have been left to them, and that there must therefore be a new trial. *Griffith v. Taylor*. 459, 468 *note*.

See FACTOR, 486, 499 *note*.

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B.

BANKER.

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BANKRUPTCY.

1. H. and C. having with W. S. and two other persons for themselves and each of them, and any two, three, or four of them, jointly and severally bound themselves to the respondent in a large sum of money to secure advances to be made to W. S.; H. and C., who carried on business in partnership, were adjudicated insolvents, both in respect of their separate estates and their joint estate, upon their own application, under the local Insolvent Act.

C. and H. each entered the debt (which was unconnected with their partnership business) to the respondents under the bond in the schedule of his separate estate. The respondent was subsequently admitted to prove the same against the joint estate:

Held, that, under the bankruptcy law of England as it existed in 1841, which had been introduced into the colony concurrently with the Insolvent Act, the respondent was properly admitted to prove against the joint estate *pari passu* with the partnership creditors.

2. No distinction can be drawn between joint debts so as to exclude from proof against the joint estate of any joint debt which is not shown to have been incurred in the strict sense of the term as a partnership transaction, and as arising out of partnership business, either under the said bankruptcy law or under sects. 4 or 17 of the Insolvent Act. *Hoare v. Oriental Bank.* 126
3. By arrangement previously made between the parties, G. drew bills on S., and S. drew bills on G.; the acceptances were, in form, duly given. Both G. and S. were at the time, and were known by each other to be insolvent, and to be contemplating bankruptcy. Some of these bills, amounting to £1,727, were purchased by J. for a sum of £200. J. had before been a discounteer of bills, but not a purchaser of them. He knew at the time that G.

was in embarrassed circumstances, but believed that G. possessed assets. He knew too that certain persons could give him full information as to G.'s affairs, but he made no inquiries from them. He declined to discount these bills, but purchased them. G. became bankrupt. J. proposed to prove against G.'s estate for the full amount of the bills. The trustee in bankruptcy gave him notice that "at the date of the bankruptcy of G. you were not the holder of the bills of exchange in the affidavit mentioned, or any of them, for value, and could not then have maintained an action against G. thereon, if he had not become bankrupt." In the County Court, in Bankruptcy, this objection of the trustee was adopted, and the proof of J. upon the bills was restricted to the £200. The Chief Judge in Bankruptcy reversed this decision and ordered a proof to be allowed for the full amount of the bills. The Court of Appeal reversed this order, and restricted the proof to the amount paid for the purchase of the bills. On appeal to this House:

Held, first, that the form of the notice was sufficient under the Bankruptcy Orders of 1870. Secondly, that the order of the Chief Judge in Bankruptcy must be discharged, for that, under the circumstances proved in the case, J. must be taken to have had notice that the bills were fraudulent.

4. *Per LORD O'HAGAN*: *Quære*, whether the argument that the notice of objection to the title of a holder of bills was too vague and general in its terms, could be brought forward in this House on appeal, where no such point had been taken in the court below.
5. *Per LORD BLACKBURN*: Though since the repeal of the usury laws, the fact of taking a bill at considerable undervalue is not, of itself, sufficient to affect the title of the holder, it is an important element in considering whether the man who gave the undervalue was acting *bona fide*, in ignorance and error, or was assisting in committing a fraud, and avoided making inquiries because they might be injurious to him. *Jones v. Gordon.* 127
6. B., having presented a petition for the liquidation of his affairs, the statutory majority of his creditors passed a resolution accepting a composition pay-

able in three instalments, the last instalment to be guaranteed by the defendant. The defendant signed a guarantee accordingly, and a deed was made between B., the defendant, and certain persons called "the inspectors." The creditors of B. were also made parties to the deed, but some of them did not execute it. By the deed, after reciting that it had been agreed that, until payment of the composition, B. should carry on his business under the inspectors, it was provided that if B. should make default in the payment of it, or if it should appear to the inspectors, from the state of his business or otherwise, that the instalments would not be duly met, it should be lawful for them to apply to the Court of Bankruptcy to adjudge him a bankrupt, and without prejudice to this right it should be lawful for them in any such event to require him to assign all his property to them, as if they were trustees under liquidation proceedings, and further, that, "in the event of B. being adjudicated bankrupt, or of a conveyance or assignment of his property being made or required under the provisions of the deed before full payment of the composition, the defendant should be released from his guarantee." B., having made default in payment of the second instalment, was made bankrupt on the petition of a creditor who was not bound by the resolution, and had not executed the deed. After the bankruptcy he made default in payment of the third instalment:

Held, affirming the judgment of the Queen's Bench Division, that the defendant was liable; as he could only be released from his guarantee by a bankruptcy procured by the inspectors under the provisions of the deed. *Glegg v. Gilbey*. 281

7. The creditors of a debtor who had filed a liquidation petition resolved to accept a composition, payable in two instalments, the second instalment being secured by the joint and several promissory note of two sureties. No trustee was appointed. The debtor's solicitor registered the resolution, and he, by means of money supplied to him by the debtor, paid the creditors the first instalment. A sum sufficient to provide for the payment of the second instalment was placed in the solicitor's hands, partly by the debtor, but mainly by one of the sureties. The debtor

gave the surety a bill of sale as security for the amount which he advanced. The solicitor sent a circular to the creditors, stating that he should be prepared on a specified day to pay them the second instalment at his office. He after this paid some of the creditors, but most of them were left unpaid. One of the latter applied to the court for an order that the solicitor should pay him. The solicitor claimed a lien on the moneys in his hands for costs due to him by the debtor, who had absconded:

Held, that the solicitor had constituted himself a trustee of the money for the creditors, and that the court had jurisdiction to order him to pay the applicant his proportion of the second instalment, which he was accordingly ordered to pay, with the applicant's costs. *Matter of Clark*. 735

8. An undischarged debtor went into business again, and afterwards filed a second liquidation petition. His creditors, old and new, empowered the trustee to sell the debtor's estate to him for £475, upon payment of which sum he was to be entitled to his discharge. The money was paid, and was then claimed by the trustee under the first liquidation. The court decided in favor of that claim. The second trustee thereupon claimed the debtor's stock-in-trade and effects:

Held (reversing the decision of the County Court Judge), that the debtor, having paid the £475, was free from the claims of all his creditors, and was entitled to retain whatever property he had acquired. *Matter of Caughey*. 739

9. An assignment of part of the property of a man who is unable to meet his engagements to a trustee for a special class of creditors is not prevented from being a fraudulent preference by any amount of pressure.
10. According to the rules of the Stock Exchange a member who is unable to meet his engagements on the Stock Exchange is declared a defaulter, ceases to be a member, and cannot be re-admitted unless he pays 6s. 8d. in the pound on his Stock Exchange debts. According to the same rules his Stock Exchange assets are collected by the official assignees of the Stock Exchange, and distributed among the Stock Exchange creditors. A member who had

been declared a defaulter attended the usual meeting of the Stock Exchange creditors and gave to the official assignees, for distribution among his Stock Exchange creditors, a check on his bankers for £5,000, being about five-eighths of his assets, stating at the same time that he had none but Stock Exchange creditors. On the day after this sum had been distributed the debtor informed the Stock Exchange creditors that his father-in-law claimed to be a creditor for a large amount for money lent. It did not appear that up to this time the debtor had committed any act of bankruptcy, but soon afterwards he filed a liquidation petition, and was adjudged bankrupt:

Held (reversing the decision of the Registrar), that the trustee in bankruptcy was entitled to recover the £5,000 from the official assignees of the Stock Exchange. *Matter of Saffery.*

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11. A debenture of a joint stock company, by which the company undertake to pay a sum of money, with interest, and charge their undertaking and property with the payment thereof, is a *chose in action* within the meaning of sect. 15, sub-sect. 5, of the Bankruptcy Act, 1869.

12. An assignment of such a debenture by indorsement in blank confers a good title on the assignee as against the trustee in bankruptcy of the assignor, notwithstanding that the assignee gives no notice to the company until after the commencement of the bankruptcy.

13. The words "debts due to the bankrupt in the course of his trade" in sect. 15, sub-sect. 5, of the Bankruptcy Act, 1869, do not extend to all debts due to the bankrupt during the period of his trading, but include only debts connected with the trade. *Matter of Pryce.*

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See BUILDING CONTRACT, 738.

CRIMINAL LAW, 874.

FRAUDULENT CONVEYANCE, 717, 730.

SET-OFF, 99.

BIGAMY.

See CRIMINAL LAW, 391, 392 *note*.

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BILL OF EXCHANGE.

See BANKRUPTCY, 127.

FORGED CHECK, 426.

BILL OF LADING.

See CHATTEL MORTGAGE, 145.

BILL OF SALE.

See CHATTEL MORTGAGE, 839.

BOARD OF HEALTH.

See CRIMINAL LAW, 451, 458 *note*.

BONA FIDE.

See BANKRUPTCY, 127.

CHATTEL MORTGAGE, 839.

TRUSTS AND TRUSTEES, 762, 774 *note*.

BONA FIDE HOLDER.

1. Scrip certificates, by which it was certified that, after the payment of certain instalments, the bearer thereof would be entitled to be registered as the holder of shares in a banking company, were issued to the plaintiff, and by him deposited with a stockbroker for the purpose of paying the instalments remaining due, and dealing with such certificates as the plaintiff should direct. The broker in fraud of the plaintiff, and without his authority, deposited the scrip with the defendants as security for an amount due from him, the broker, to the defendants. The defendants were not aware of the fraud. It was proved that the usage among bankers, discounters, money dealers, and on the Stock Exchange, had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery:

Held, on the authority of *Goodwin v. Roberts* (1 App. Cas., 476; Law Rep., 10 Ex., 337), that the defendants were entitled to the scrip certificates as against the plaintiff, first, on the ground that by reason of the usage the certificates had become negotiable instruments transferable by mere delivery, and, secondly, on the ground that the plaintiff, by depositing with his broker instruments purporting to be transferable by delivery to a *bona fide* holder for value, was estopped from denying that they were so transferable. *Rumball v. Metropolitan*, 276, 280 *note*.

BONDS, CORPORATE.

See BANKRUPTCY, 841.

BROKER.

See BANKRUPTCY, 758.
FACTOR, 486, 499 *note*.

BUILDING CONTRACT.

1. A builder contracted with a building club to erect some houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architect of the club, or become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements; provided that the contractor should have drawn money on account of his contract.

The contractor commenced the works and carried them on for some time, receiving a considerable sum from the club. On the 30th of May he filed a liquidation petition. On the 2d of June the architect of the club gave notice to the contractor that, as he had neglected

to proceed with the works, they should, on the expiration of two days, employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works, and on the expiration of this notice the club took possession of the materials, implements, and plant:

Held, that the club were entitled, as against the trustee in the liquidation, to retain what they had seized, the seizure being a protected transaction within sect. 94 of the Bankruptcy Act, 1869. *Matter of Waugh*. 738

BURTHEN.

See AGREEMENT, 171, 199 *note*.
OWNER, 826.
PRESUMPTION, 225.

C.

CARRIERS.

1. The plaintiff was a brewer carrying on business at B., where the defendants, a railway company, and the M. Company, another railway company, had stations. Three firms of brewers also carried on business at B., and their premises respectively were connected with the M. Railway. The plaintiff's premises were not connected with the M. Railway. In order to prevent the traffic of the three firms from passing wholly over the M. Railway, and to divert some portion of it to their own line, the defendants carted goods gratuitously between their station at B. and the premises of the three firms respectively, and they also allowed certain deductions from the rates charged to the three firms for the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the defendants gratuitously. The defendants did not cart goods gratuitously for the plaintiff between his premises and their station, and they did not allow to him deductions similar to those allowed to the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before-mentioned, the defendants derived a profit from the

traffic, and they had not any intention to prejudice the plaintiff:

Held, that the gratuitous carting, loading, and unloading of the goods for the three firms was an undue preference granted to them by the defendants, and was in contravention of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendants which represented the cost of carting his goods between his premises and their station at B., and of loading and unloading the same. *Evershed v. London, etc.* 323

2. Luggage carried for a passenger without extra charge is within s. 7 of the Railway and Canal Traffic Act, 1854, which enacts that a railway company "shall be liable for the loss of or injury to any horse, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect of such company or its servants, notwithstanding any notice or condition made and given by such company in anywise limiting such liability;" and the provisions of that section are extended, by s. 16 of the Regulation of Railways Act, 1868, to the traffic on board steamers belonging to or used by railway companies authorized to have and use them.

3. Plaintiff was an English subject, and defendants were an English railway company subject to the English statutes as to railways, and authorized to have and work steamers between Boulogne and Folkestone. Plaintiff took a ticket at an office of the defendants in Boulogne, for a through journey from Boulogne to London, by defendants' steamer to Folkestone, and thence by their railway to London. On the ticket was: "Each passenger is allowed 120 lbs. of luggage free of charge." "The company is in no case responsible for luggage of the passenger travelling by this through ticket of greater value than £6." Plaintiff had a box with her, which was given in charge of defendants' servants, and in transferring it from the boat to the train it fell into the sea, owing to the negligence of defendants' servants, and the contents were damaged to the amount of £73:

Held, affirming the judgment of the

Exchequer Division, that, assuming the contract to be governed by English law, the condition on the ticket was void by reason of the above sections, and defendants were liable for the loss.

4. *Quære*, whether the contract was governed by English or French law, or partly by one and partly by the other. *Cohen v. South Eastern Railway.* 525

See DAMAGES, 634.
NEGLIGENCE, 402.

CASE STATED.

1. Justices have no power to state a case on refusing to make an order authorizing the local authority to enter premises under the Public Health Act, 1875, s. 305, inasmuch as this is not the determination of a complaint within 20 & 21 Vict. c. 43, s. 2. *Diss Urban, etc., v. Aldrich.* 263

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- Pickard v. Smith, 10 C. B., N.S., 470, *considered*. 341
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- Purcell v. Sowler, 18 Eng. Rep., 332, *affirmed*. 478
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- Regina v. Keyn, 19 Eng. R., 366, *followed*. 446
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- Williams v. Owen, 13 Sim., 597, *considered*. 805
- Wolfe v. Findlay, 6 Hare, 66, *disapproved*. 653

CHARGE BY COURT.

See PRESUMPTION, 59.

CHARTERPARTY.

1. The plaintiff agreed to charter a ship for twelve months after the completion of her then present voyage. After the completion of the voyage and when the plaintiff was ready to load the ship she was detained as unseaworthy; and the repairs were not finished until more than two months after the completion of the voyage:
Held, affirming the decision of the Queen's Bench Division, that the plaintiff was entitled to throw up the charterparty. *Tully v. Howling*. 266
2. Statement of claim, that defendants chartered plaintiff's ship for a voyage from Cardiff to Callao with a cargo of coals, to be consigned to defendants' agent at Callao. By the charterparty the ship was to be loaded at the rate of 75 tons per day, commencing when she

was wholly unballasted; stiffening coal to be supplied at the ship's expense at the rate of 40 tons per working day, all days on which stiffening coal was taken on board or the ship was detained for the same, to be excluded from the working days allowed for loading; the vessel to be discharged at the rate of 40 tons per day; demurrage to be paid for each day beyond the said days allowed for loading and discharging at the rate of 3*d.* per registered ton per day; the master to have a lien on the cargo for all freight and demurrage; all liability of the charterers to cease as soon as the cargo was on board; and all questions, whether of short delivery, demurrage, or otherwise, to be settled with charterer's agent at the port of destination (which settlement to be binding on the owners); the owners and master to have a lien on the cargo for all freight, dead freight, and demurrage.

That the ship was detained by the default of the defendants in providing stiffening coal; that the cargo was ultimately loaded; that plaintiff requested the defendants' agent at Callao to settle the claims as to demurrage, &c., of the plaintiff, which he refused to do; but the defendants' agent required the plaintiff to deliver the cargo, which the plaintiff accordingly did, without enforcing his lien for demurrage. Plaintiff claimed £350 from the defendants for demurrage or damages for detention.

The defendants demurred to so much of the claim as alleged liability under the charterparty, on the ground that the liability of the defendants had ceased on the loading of the cargo:

Held, 1. That the demurrage clause applied to the loading of the stiffening coal as well as to the loading of cargo proper. But, 2. Even if it did not, the lien for "demurrage" would extend to damages for detention by not loading stiffening coal, as well as to demurrage proper. And therefore, 3. That the cesser of liability clause applied to liability in respect of both. 4. That the fact that defendants were themselves consignees as well as charterers made no difference in the construction of the cesser of liability clause. 5. That the rest of the clause, giving the defendants' agent power to settle claims for short delivery and demurrage, made no difference in the construction as to cesser of liability. 6. That the facts,

that the defendants' agent refused to settle the demurrage, and that the plaintiff had delivered the cargo at the request of the defendants' agent without enforcing the lien, did not revive the defendants' liability under, or give rise to an action on, the charterparty. *Sanguinetti v. Pacific Steam, etc.* 809

See ADMIRALTY, 507.

CHATTEL MORTGAGE.

1. A mortgagee of a ship does not, ordinarily speaking, obtain, by the mortgage alone, a transfer, by way of contract or assignment, of the right to freight. The mortgagor remains the *dominus* of the ship, with regard to everything relating to its employment, or non-employment, or to any rate of freight to be earned by its employment, until the mortgagee takes possession. The mortgagee on taking possession becomes the owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight, which, by contract or otherwise, is lawfully payable.
2. Goods which, by the terms of the bill of lading, have been carried upon a nominal amount of freight, can be lawfully demanded, by the holder of the bill of lading, on payment of that amount.
3. The owner of a ship cannot, by his subsequent acts, give to his mortgagees, as against the holder of a bill of lading, rights different from those possessed by himself under it.
4. M. was the owner of sixty shares in a ship. B. (who acted as master) was the owner of the remaining four shares. As B. could not get, at San Francisco where he was, any employment for the ship, he determined to obtain a cargo of wheat and bring it to England "on ship's account." Not having money to purchase the wheat, he obtained the cargo on the credit of P. & Co. To them he gave bills of lading, describing the wheat as "shipped on owner's account," deliverable to the order of P. & Co. "at freight of 1*s.* per ton." Bills of exchange for the price of the

wheat (afterwards duly accepted by M.) were also given to P. & Co. M., who carried on business in London, had obtained from K. & Co., merchants in London, advances of money, and, by way of security, had given them a mortgage of his shares in the ship. While the ship was on its voyage, M. arranged with B. & Co., also of London, to make him advances to take up the bills of exchange; the advances were made, and, for these advances, he agreed that B. & Co. should receive the bills of lading, and certain policies of insurance effected by him, and should sell the cargo for his account and their own. B. & Co. sold the cargo of wheat to third persons. The sale note described the wheat as "at the price of 43s. 6d. per quarter of 500 lbs. shipped . . . including freight and insurance, &c. . . . Vessel to discharge afloat. Payment, cash in London, within seven days," &c. The last sentence of the note was, "As cargo is coming on ship's account, freight is to be computed at 55s. per ton of 2240 lbs. and invoice to be rendered accordingly." The invoice, made out by M. contained these words "6179 qrs. @ 43s. 6d. per 500 lbs." "Freight on tons 1379-7-1-3 @ 55s. per 2240 lbs." M. obtained from B. & Co. necessary advances, with which he took up the bills of exchange, which, with the bills of lading attached, were then handed to him. Both sets of bills were delivered to B. & Co. with a memorandum indorsed on the bills of lading that they were "assigned to B. & Co.," and "the freight assigned is at the rate of 55s. per ton, and not the nominal amount of 1s. per ton." The bills of lading and invoice were sent to the purchasers of the wheat. When the vessel arrived K. & Co., as mortgagees of the ship, took possession of it. The purchasers of the wheat claimed delivery of it to them on payment of the freight stated in the bills of lading :

Held, that they were entitled to the delivery of it on payment of that freight, for that the bills of lading could not, under the circumstances of the case, be altered, and that the 55s. per ton, introduced into the bought note, formed part of the whole purchase-money, being a payment to be made on delivery of the cargo, and though called "freight" did not properly bear that character. *Keith v. Burrows*. 145

5. A trader gave to one of his creditors a bill of sale of all his property to secure a then existing debt and a fresh advance. It was verbally agreed that the bill of sale should not be registered, but that the grantor should give a new bill of sale in substitution for the first when required to do so by the grantee. More than two months before the grantee filed a liquidation petition a new bill of sale was given, and was registered, and the grantee put a man in possession of the property. But the grantor's name remained on the premises as the ostensible occupier of them :

Held, that, there having been a sufficient fresh advance when the first bill of sale was given, the substituted bill of sale was good as against the trustee in the liquidation. *Matter of Jackson*. 839

See FIXTURES, 723.

FRAUDULENT CONVEYANCE, 717, 730.
MORTGAGE.

CHECK.

See FORGED CHECK, 426.

CHILDREN.

See DEATH, 547, 557 *note*.
LIFE ESTATE, 647.
POWER, 778.
WILLS, 796.

CHOSE IN ACTION.

See BANKRUPTCY, 841.

COLLATERAL SECURITY.

See SET-OFF, 99.

COLLISION.

See ADMIRALTY, 573, 582.

COMMON.

1. General words in a conveyance by the lord of a manor of (*inter alia*) a small parcel of land which had been copyhold and was afterwards surrendered to extinguish the copyhold tenure, *held* not to recreate rights of common.
2. The lord of a manor may take gravel, marl, loam, and subsoil in the waste, for his own use and for the purpose of sale, so long as he does not infringe upon the rights of the commoners.
3. On the question whether the loam is taken to such an extent as to interfere with right of common, the *onus probandi* is on the tenant and not on the lord as in the case of approvement. *Hall v. Byron*. 826

COMPLAINANTS.

See PLAINTIFFS, 775, 777 *note*.

COMPOSITION.

See BANKRUPTCY, 785, 789.

CONFLICT OF LAWS.

See LEX LOCI.

CONSTRUCTION.

See AGREEMENT.
SPECIFIC PERFORMANCE, 676.
WILLS.

CONTRACT.

See AGREEMENT, 171, 199 *note*.

CONTRACTOR.

See MASTER AND SERVANT, 469, 475 *note*.
PRINCIPAL AND AGENT, 341, 343 *note*.

COPYRIGHT.

1. An assignment of a copyright under 5 & 6 Vict. c. 45, must be in writing.
2. Accordingly, where the author of a song agreed verbally with S. to part with his copyright, and subsequently by instrument in writing assigned it to L., who entered the song at Stationers' Hall:
Held, that the title of L. must prevail, and that he could sustain an action to restrain S. from infringing his copyright. *Leyland v. Stewart*, 652

CORPORATE BONDS.

See BANKRUPTCY, 841.

CORPORATIONS.

1. To prove the existence of a company it is sufficient to prove that it had carried on business as such. *Regina v. Langton*. 855, 859 *note*.
 2. Directors, with borrowing powers, issued debentures at 7½ per cent. discount. Some of the debentures having been taken by a director:
Held, that the issue of debentures at a discount was not illegal; and that the director was not liable to the company for the difference between 92½ per cent. and par. *Campbell's Case*. 702
 3. When mortgage by transfers interest in real estate. *Chandler v. Howell*. 815, 824 *note*.
- See* BONA FIDE HOLDERS, 276, 280 *note*.
FRAUD, 286.
TRUSTS AND TRUSTEES, 762, 774 *note*.

COUNTER CLAIMS.

1. When and how far plaintiff may be delayed by equities between defendants. *Furness v. Booth*. 775, 777 *note*.
- See* SET-OFF, 99.

COVENANT.

See RESTRAINT OF TRADE, 800, 803 *note*.

CREDITORS.

See EXECUTORS AND ADMINISTRATORS, 780.
FRAUDULENT CONVEYANCE, 707.

CRIMINAL LAW.

1. *Accomplice*. Several persons were tried upon one indictment, some as principals in murder, others as accessories after the fact. The principals were convicted of manslaughter :

Held, that those charged as accessories might rightly be convicted as accessories to manslaughter. *Regina v. Richards*. 370, 372 *note*.

2. *Bankruptcy*. An indictment charged that the defendant, a trader, "did within four months next before the commencement of the liquidation by arrangement of his affairs obtain from W. goods upon credit under the false pretence, &c., with intent to defraud." And in another count in similar terms the defendant was charged with unlawfully disposing of the goods otherwise than in the ordinary way of his trade. Both counts were framed under sect. 11, sub-sects. 14 and 15 of 32 & 33 Vict. c. 62.

Held, that the counts were good after verdict, and sufficiently averred that the defendant was a person whose affairs were liquidated by arrangement within the meaning of sect. 11. *Reg. v. Knight*. 374

3. *Bigamy*. In an indictment for bigamy evidence is not admissible to show that the prisoner honestly believed that his first wife was dead, when he married a second; within seven years of his last having heard of or seen the first wife.

4. *Semble*, however reasonable such a belief may be, it can only be used in mitigation of punishment after conviction. *Regina v. Bennett*. 391, 392 *note*.

5. *Discharge*. 1. Upon a charge of murder, by poison, the presentment of a bill

to the grand jury cannot be postponed to the next assizes, on the ground that other and like charges may before that time be brought against the prisoner, and if no bill is so presented the prisoner is entitled to be discharged. *Reg. v. Heesom*. 384

6. *Embezzlement*. The prisoner was indicted under the second branch of 24 & 25 Vict. c. 96, s. 75, for that he being intrusted, as a broker, attorney, or agent, with valuable securities for a special purpose, without authority to sell, negotiate, transfer, or pledge them, unlawfully and contrary to the purpose for which the securities were intrusted, converted to his own use a part of the proceeds. The facts proved were as follows : The prisoner was an insurance broker, and had, as such, effected insurances on a ship for the prosecutor ; and the ship having been lost, the prosecutor sent him the policies, three in number, one with the A. office, one with the I. office, and one with underwriters, with other documents necessary for recovering the loss. On the 17th of December, the prisoner received the amount of the I. office's policy, and on the 31st of December, the amount of the A. office's policy. Each amount was paid him by a check to his own order, which in each case he paid into his own bank to his own credit. The prisoner did not pay over to the prosecutor any of the money so received by him ; but, being pressed for it, gave various excuses for not doing so. On the 27th of January following, he filed a petition for liquidation ; and his balance at his bank was then much less than the sum received on the policies. The prisoner having been convicted on these facts :

Held (by Cockburn, C.J., Kelly, C.B., Bramwell and Amphlett, JJ.A., Pollock, B., and Field, J.), that the conviction was wrong.

7. By Cockburn, C.J., on the ground that, even assuming the prisoner could have been properly convicted if there had been evidence that the prisoner had received the money with the intention of embezzling it, in the absence of such evidence and a finding to that effect, he could not be convicted.
8. By Kelly, C.B., and Pollock, B., on the ground that, in the absence of evidence of the previous course of dealing

between the parties, and of what the duty of the prisoner was as to handing over or accounting for the money received, the conviction could not be upheld.

9. By Bramwell and Amphlett, JJ.A., and Field, J., on the ground that the branch of the section in question applies only to the case of an agent, intrusted with securities without authority to obtain money upon them, who wrongfully appropriates the securities, or wrongfully obtains money upon them and appropriates the money; following *Reg. v. Cooper* (Law Rep., 2 C. C., 123). *Regina v. Tallock*. 242, 255 note.

10. *Evidence*. 1. It was proposed to read, on the trial at the assizes, the deposition of a witness called before the magistrates, on the same charge, now absent by reason of pregnancy. Evidence given by a doctor on February the 5th, that he had last seen the witness on the 29th day of January, and that she then was daily expecting her confinement, but which had not yet taken place, was held to be sufficient to entitle the deposition to be read at the trial on the 5th of February.

2. Upon an indictment for murder by poison of S. in October, 1877, evidence is admissible of the previous and subsequent deaths of J. and L., under like circumstances and from similar symptoms, to show that the poisoning was not accidental: and where it is proved that a motive for the death of S. might exist, by the fact of the prisoner having insured the life of S. in a benefit and insurance society, evidence may also be given upon the same indictment that there might be an equal motive for the deaths of J. and L., by showing that they also were each of them insured by the prisoner in the same or kindred societies. *Reg. v. Heesom*. 384, 389 note.

11. *False Pretences*. 1. On an indictment for obtaining money by false pretences, it was proved that the prisoner, a travelling hawker, represented to the prosecutor's wife that he was a tea dealer from Leicester, and induced her to buy certain packages which he stated to contain good tea, but three-fourths of the contents of which was not tea at all, but a mixture of substances unfit to drink and deleterious

to health. The jury found that the prisoner knew the real nature of the contents of the packages, that it was not tea, but a mixture of articles unfit for drink, and that he designedly falsely pretended that it was good tea with intent to defraud; and the prisoner was convicted:

Held, that the conviction was right. *Regina v. Foster*. 361

12. A prisoner convicted of obtaining money by false pretences, after a previous conviction for felony (the previous conviction being charged in the indictment), cannot be sentenced to penal servitude for a less term than seven years. *Regina v. Deane*. 364

13. Where K. was indicted in the following form, that he did falsely pretend that he the said K. was one G., who had moneys deposited in the Cork Savings Bank, and who had a book of the said bank with a statement of his account in it, which book he the said K. presented to the cashier of the bank at the time he represented himself to be the said G., by means of which said false pretence the said K. obtained moneys, &c., whereas in truth K. was not the person so named in the said savings bank book, nor had he any authority then or at any other time from the said G. to present the said book at the savings bank for the purpose of drawing out money, neither had he, the said K., any authority from G. to draw money from the said bank, it was held that the subsequent portion of this indictment did not negative the previous averments, and in consequence the indictment was quashed. *Reg. v. Kelleher*. 395

14. *Health. Exposing infected person*. Sect. 126, subs. 2, of the Public Health Act, 1875 (38 & 39 Vict. c. 55), subjects to a penalty any person who while suffering from an infectious disorder wilfully exposes himself, without proper precautions against spreading the disorder, in any street or public place, &c., or who, being in charge of any person so suffering, so exposes such person.

15. A medical man in practice in Tunbridge sent a patient who was suffering from scarlet fever to the fever hospital there with a certificate, directing him to walk in the middle of the

road, and not to talk to any one, but, in consequence of an alleged informality in the certificate, the patient was refused admission; whereupon the medical man walked with him through the streets of the town to the residence of the chairman of the local board, from whom after some delay he obtained an order for the man's admission to the hospital. He then returned with the patient to the police station to procure the ambulance to convey him thither.

Upon an information against the medical man for an alleged infringement of the statute, the justices were of opinion that it was not proved before them that the medical man "had charge of" the patient, that he had not wilfully exposed the patient in any street or public place "without proper precaution," and that he had made the best use of the means at his disposal to prevent the spread of the fever; and they refused to convict him:

Held, that their decision was right.
Tunbridge, etc., v. Bishopp. 451,
458 note.

16. *Larceny.* A wife, though she may have committed adultery, cannot steal her husband's goods; and therefore the adulterer, receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods. *Regina v. Kenny.* 366,
370 note.

17. *Offensive weapon.* Three men in company were seen hunting game in the night time with dogs.

18. It was not proved that two of the men were in any way armed. The third (the prisoner), who was lame, only carried the stick with which he usually walked.

19. The jury should not find the prisoner guilty unless satisfied that this walking-stick was an offensive weapon, and that the prisoner had carried it with the intention of using it as an offensive weapon should occasion arise. *Reg. v. Williams.* 399

20. *Rape.* Where a man is charged with committing a rape upon a female, the full particulars of the complaint she made against him to other persons in his absence some time after the alleged offence may be given in evidence. *Reg. v. Wood.* 393, 394 note.

See CORPORATIONS, 355.

CRUELTY TO ANIMALS, 558, 564 note.

JUGGLERS, 536.

PARTNERSHIP, 355.

CROPS.

See MORTGAGE, 475, 478 note.

CRUELTY TO ANIMALS.

1. Upon an information against the respondents, under 12 & 13 Vict. c. 92, s. 2, for cutting the combs of cocks, evidence was given that the operation caused very great pain, and was inflicted in order to fit the birds for one or other of two purposes; cock-fighting or winning prizes at exhibitions. The magistrates having referred to the court the question whether the case was one of the class contemplated by the statute:

Held by Kelly, C.B., that the respondents did, as a matter of fact, "cruelly ill-treat, abuse, or torture the birds;" that, as a matter of law, the act could not be justified by the purpose of cock-fighting, and that the respondents ought to have been convicted.

2. By Cleasby, B. (without expressing any opinion upon the facts), that neither the purpose of cock-fighting nor that of winning prizes at exhibitions would prevent the case from being within the statute. *Murphy v. Manning.* 558, 564 note.

CUSTOM.

See PERFORMANCE, 30.

D.

DAMAGES.

1. Where, on account of defects in the ship, the voyage had been protracted, and in the meantime the market price of the goods shipped had fallen:

Held, reversing the judgment of the Admiralty Division, that the consignee could not recover damages for the loss of market. *The Parana*. 684

See EMINENT DOMAIN, 295, 308 note.

LIBEL, 421.

RESTRAINT OF TRADE, 800, 803 note.

DEATH.

1. At the trial of an action for the recovery of land, in 1876, it was proved by the plaintiff that J. F. W. died seised in fee, without issue, and intestate, in 1868; that all the descendants of his paternal grandfather, J. W., were dead, and that the plaintiff was the heir-at-law of the paternal grandmother. On the death of the intestate in 1868 advertisements were published in the London and provincial newspapers, for the heir-at-law of J. F. W., describing his father and grandfather and the property. Several persons came forward, and, besides the plaintiff, no one was able to establish any relationship except the defendants, who were co-heiresses of the mother of J. F. W., and to whom the tenants of the property had attorned. Deeds, wills, and documents were put in evidence, in which no mention was made of any person who would have been of nearer kin than the plaintiff, beyond those whose deaths were proved. The defendants proved that the paternal great-grandfather had, besides J. W., another son, N. W., born in 1717, and also a sister, a Mrs. M., both of whom were alive in 1755, and that the paternal great-grandmother's maiden name was S. B. But no further evidence as to N. W., Mrs. M., or the B. family was given:

Held, that there was evidence on which the jury might properly find for the plaintiff. *Greaves v. Greenwood*. 547, 557 note.

See CRIMINAL LAW, 391, 392 note.
PRESUMPTION, 59, 87 note.

DEATH, PRESUMPTION OF.

See CRIMINAL LAW, 391, 392 note.
DEATH, 547, 557 note.
PRESUMPTION, 59, 87 note.

DECLARATIONS.

See EVIDENCE, 614, 616 note.

DEFENDANTS.

1. When and how far plaintiff may be delayed by equities between. *Furness v. Booth*. 775, 777 note.

DEMURRAGE.

See ADMIRALTY, 507.
CHARTERPARTY, 309.

DIRECTORS.

See CORPORATIONS, 702.
TRUSTS AND TRUSTEES, 764, 774 note.

DISAFFIRMANCE.

See FRAUD, 286.

DISCHARGE.

See CRIMINAL LAW, 384.

DISCRETION.

See OFFICERS, 514, 522 note.

DISEASED PERSON.

See CRIMINAL LAW, 451, 458 note.

DOMICIL.

See LEX LOCI, 605, 617.

DOWER.

1. A wife, married before the Dower Act, who joined her husband in conveying, by deed acknowledged, his freeholds to a mortgagee free from dower, with a proviso for redemption in favor of the husband, and a power of sale directing the surplus to be paid to the husband:

Held to be entitled, when a widow, to redeem her dower.

2. In the above circumstances, the widow, having been a surety for the husband, is entitled, upon payment or satisfaction of the first mortgage debt, to hold the property comprised in the first mortgage as a security for her dower against the subsequent incumbrancer.

3. Husband and wife, having been married before the Dower Act, joined in a deed, acknowledged by the wife, in mortgaging the husband's freeholds, free of dower, to secure a debt of the husband. The reconveyance on redemption and the surplus proceeds of sale were reserved to the husband alone. Afterwards, by deed executed by the husband alone, the lands were purported to be conveyed, subject to the first mortgage, free of dower, to a second mortgagee. Then by deed, to which the first and second mortgagees only were parties, the second mortgagee took a transfer to himself of the first mortgage debt and securities; and afterwards sold the property:

Held, that the widow was entitled to dower out of the surplus proceeds of sale after payment of the expenses of sale, and of the first mortgage debt, interest, and costs. *Dawson v. Bank of Whitehaven*. 805

DRAIN.

See NUISANCE, 500, 506 *note*.

E.

EASEMENT.

See OWNER, 826.

EMBEZZLEMENT.

See CRIMINAL LAW, 242, 255 *note*.

EMINENT DOMAIN.

1. The owner of a ferry cannot maintain an action for loss of traffic caused by a new highway by bridge or ferry made to provide for a new traffic.

2. *Quære*, whether the exclusive right of the owner of a ferry extends beyond the carriage of passengers by boat.

3. A railway company, under the authority of their act, constructed across a river, half a mile above an ancient ferry, a railway bridge and a foot-bridge, the foot-bridge being used by persons going to the railway station and also to other places. The traffic across the ferry fell off, and the ferry was given up. The owners of the ferry claimed compensation under the Lands and Railway Clauses Acts.

Held, reversing the decision of the Queen's Bench Division, that no compensation could be recovered: First, on the ground that an action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or by the foot-bridge, if they had been erected without the authority of an act. Secondly, on the ground that, the injury to the ferry being occasioned, not by the construction but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act or the Railway Clauses Act. *Hopkins v. Great Northern*. 295, 308 *note*.

EQUITIES.

1. When and how far plaintiff may be delayed by equities between defendants. *Furness v. Booth*. 775, 777 *note*.

ESTOPPEL.

See FORMER SUIT, 89.

EVIDENCE.

1. The prisoner was a timekeeper, and T. C. was pay clerk, in the employment of a colliery company. It was the duty of the prisoner every fortnight to give a list of the days worked by the workmen to a clerk who entered the days and the wages due in respect of them in a time book. At pay time it was the duty of the prisoner to read out from the time book the number of days worked by each workman to T. C., who paid the wages accordingly. And T. C. saw the entries in the time book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences:

Held, that T. C. might refresh his memory, by referring to the entries in the time book, in order to prove the sums paid by him to workmen.

2. The prisoner being charged with obtaining by false pretences the moneys of a company:

Held, that the existence of the company was sufficiently proved by evidence that it had carried on business as such. *Regina v. Langton*. 355, 359 note.

3. When and how far declarations of prosecutrix in rape admissible. *Reg. v. Wood*. 393, 394 note.

4. Declarations of a deceased person, who has been in possession of property claiming a limited interest therein under a particular will, are admissible to prove the fact that such will had a legal existence, and also that certain persons were named executors therein. And where a copy of such will, the original not being forthcoming, is found in the possession or amongst the papers of the legal adviser of one of such executors, it is evidence of the contents of such will, and may be admitted as such. *Sly v. Sly*. 614, 616 note.

See CRIMINAL LAW, 284, 289 note.

PARTNERSHIP, 739, 755 note.

PRESUMPTION.

EXECUTORS AND ADMINISTRATORS.

1. Desire that assist one appointed executor makes assistant executor. *Matter of De Rosaz*. 597

2. The testator, by his will, appointed one of his sisters sole executrix. He had three sisters living at that time, but two died in his lifetime:

Held, that the appointment was void from uncertainty. *Matter of Blackwell*. 602

3. The testatrix executed a will, which contained a clause to the effect, "I appoint my sister A. B. my executrix, only requesting that my nephews, C. D. and E. F., will kindly act for and with this dear sister":

Held, that C. D. and E. F. were executors according to the tenor of the will. *Matter of Brown*. 631

4. Where executors have made a proper distribution *pro tanto* of their testator's estate, and have been ready to produce proper accounts to the unpaid residuary legatees, and an administration action is then instituted by the unpaid residuary legatees, and it turns out that the accounts are substantially correct, the costs of the action must be borne by the residuary legatees who take the benefit of it.

5. But where, after executors had made a partial distribution of the residue, an administration action was instituted by the residuary legatees who had not received their shares, and it then turned out that the executors had made two mistakes, first, in making their distribution upon an erroneous assumption that the residue was divisible among five persons instead of six; and, secondly, in expending part of the general personal estate in repairs of property specifically devised:

Held, that the overpaid residuary legatees could not be made to refund, that the executors must stand in the same position as if no distribution had taken place, and that the costs of the action should be paid as out of the entire residuary estate, so as to charge the executors with the share of costs attributable to each of the distributed shares; and then that the executors should pay the balance necessary to make up to the unpaid legatees one-sixth of the residue each. *Hilliard v. Fulford*. 641

6. The executrix of a trader, who was also his residuary legatee, continued after his death to carry on his business ostensibly as her own:

Held (reversing the decision of the county court), that the assets of the business in the hands of the executrix were not impressed with any trust in favor of the testator's creditors, and consequently that, on her second marriage, such of those assets as remained in specie, as well as the property into which the rest had been converted, passed to her second husband. *Matter of Fells.* 730

7. Leaseholds are not within Locke King's Act, and mortgages thereon must be paid by the personal representative. *Hill v. Wormsley.* 824, 826 note.

See INSURANCE, LIFE, 658.
POWERS, 681, 690 note.

EXPOSURE OF DISEASED PERSON.

See CRIMINAL LAW, 451, 458 note.

F.

FACTOR.

1. The plaintiff, a tobacco manufacturer at Bolton, bought of H., a commission merchant and agent, and also a dealer in tobacco, 50 hhds. of tobacco then lying in bond in the name of H. in the L. Dock. The price was paid, but the tobacco was to remain in the dock, to be forwarded to the plaintiff as he might want it for the purpose of his business, with an understanding that the tobacco was to be cleared by H. and dispatched to Bolton free of any charge for commission, or, should the plaintiff sell any portion of it, to be delivered to his vendees; the plaintiff remitting to H. the amount of duty and dock charges. This arrangement was one so usual in the tobacco trade that any other arrangement was exceptional. For this purpose the tobacco was allowed to remain in the name of H. in the dock books, and he retained the dock-warrants. In his own books, however, the transaction was entered as a sale to the plaintiff.

H., representing the tobacco to be his own property, pledged it with the

defendants as security for a loan, handing them the dock-warrants; and he caused the tobacco to be transferred into their names in the dock books, the defendants having no knowledge that the plaintiff was interested in it. H. shortly afterwards absconded, and was adjudicated bankrupt. The plaintiff demanded the tobacco of the defendants, but they claimed to retain it, either on the ground that the plaintiff had armed H. with an ostensible authority to deal with the goods as his own, or that he was intrusted with the tobacco or the documents of title with authority to pledge or sell, within the Factors Acts:

Held, by Denman, J., on motion for judgment, the judge having power to draw inferences of fact, that H. was not intrusted with the tobacco as factor or agent for sale, but only to clear and forward it to the plaintiff or to his vendees as and when required, and consequently that he had no authority to sell or to pledge it.

2. *Held*, also, that, looking at the usage of the trade, the plaintiff had not given any ostensible authority to H. to pledge the tobacco. *Johnson v. Crédit Lyonnais.* 486, 499 note.

FALSE IMPRISONMENT.

See ARREST, 459, 468 note.

FALSE PRETENCES.

See CRIMINAL LAW, 361, 364, 395.

FIXTURES.

1. A lease of a piece of land was granted to a trader, he covenanting to build upon it a steam saw-mill, messuages, or dwelling houses, and at the end of the term to yield up to the lessor the land, buildings, and fixtures, except the steam saw-mill, machinery, fixtures, and things connected therewith, which it was agreed the lessee might remove. The lessee afterwards mortgaged the

property, the mortgage deed assigning the land, together with the steam saw-mills and buildings thereon, and the steam engines, boilers, fixed and movable machinery, plant, implements, and utensils fixed to, placed upon, or used in or about the ground, hereditaments, saw-mills, and buildings, to hold the hereditaments, and such of the machinery, plant, &c., as were in the nature of landlord's fixtures, to the mortgagee for the residue of the term, and as to such of the machinery and premises as were in the nature of tenants' or trade fixtures to the mortgagee absolutely, subject to redemption.

The deed contained a power for the mortgagee, in default of payment of the mortgage money, to sell the premises, or any part or parts thereof, either together or in parcels. The deed was not registered under the Bills of Sale Act. The mortgagor filed a liquidation petition. The mortgage money remained due. The mortgagee had not taken possession of any of the property comprised in the deed:

Held, that the effect of the deed was to authorize the mortgagee to sever the trade fixtures from the premises, and to deal with them separately, and consequently that the deed, not having been registered under the Bills of Sale Act, was void *quâ* the trade fixtures as against the trustee in the liquidation.
Matter of Eslick. 723, 728 note.

FORECLOSURE.

See PLEDGE, 782, 784 note.

FORFEITURE.

1. Where a notice to repair has been given, and the lessee makes an offer to sell his interest in the premises, and a negotiation takes place on that offer, the effect of that offer and the negotiation is to suspend the notice till the negotiation has been terminated, from which event alone the date of the notice can properly be calculated. Equity will relieve against an ejectment founded on the original notice.
2. A notice to repair, within six months, houses held on lease by the Metropoli-

tan Railway Company, was given on the 22d of October, 1874, to expire on the 22d of April, 1875. It was answered by a letter of the 28th of November, suggesting that the lessors might like to purchase the premises. The lessors' solicitors, by letter of the 1st of December, asked the price demanded, and were told, by letter on the 30th of December, that it was £3,000. The lessors' solicitors on the 31st of December, 1874, wrote to say that, considering the condition of the premises, "the price is out of all reason. We must therefore request you to reconsider the question of price, having regard to the previous observations, and to the fact that the company have already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you." No farther communication on this subject took place till the 19th of April, 1875, when the agent for the company wrote to say that as "the negotiations had not resulted in a sale" the company would take in hand the repairs. On the 20th of April the solicitors for the appellant wrote, declaring that "the negotiations" had been broken off in December last, and that there had been ample time since then to complete the repairs. On the 22d of April the notice expired, and on the 28th the ejectment was served. After verdict for the plaintiff and judgment in the court below:

Held, that the company was entitled in equity to be relieved against the forfeiture, for that the letters at the end of November and at the beginning of December had the effect of suspending the notice, and that the suspension did not come to an end till the 31st of December, till which time the operation of the notice was waived, so that no part of that time could be counted against the tenant in a six months' notice to repair. *Hughes v. Metropolitan Railway.* 15, 29 note.

FORGED CHECK.

1. An indorsement of a check payable to order, purporting to be by the agent of the person to whose order the check is payable, is, within 16 & 17 Vict. c. 59, s. 19, a sufficient authority to the banker to pay the amount of such check,

though the person who indorsed the check had no authority to indorse.

2. S. K., an agent of S. & Co., the plaintiffs, having authority to sell goods for them and to receive payment by cash or check, but not having authority to indorse checks, received from the defendants, in payment for goods supplied, a check on their bankers drawn payable to S. & Co., or order. S. K. indorsed it "S. & Co., per S. K., agent," received the money from the bankers, and misappropriated part of it. The bankers returned the check to the defendants, and the amount was allowed in account by the defendants:

Held, affirming the decision of the Common Pleas Division, that such payment by the bankers was within the protection of 16 & 17 Vict. c. 59, s. 19; and that the plaintiffs could not maintain an action against the defendants, either for the price of the goods or for the check. *Charles v. Blackwell*. 426

FORMER SUIT.

1. In 1842 a suit for declarator of marriage was brought against a lady, but after trial was dismissed in 1846. In 1875, after the lady's death, a second suit was brought for declarator of the same marriage, and for reduction of the former decree. In 1876 the second suit was held to have been barred by the plea of *res judicata*, and this decision, on appeal, was affirmed by the House of Lords.

Per THE LORD CHANCELLOR: The appellant has not alleged any new matter whatever coming to his knowledge which should entitle him to get rid of the former proceedings.

2. *Per LORD HATHERLEY*: I do not apprehend that we need go further than to say that this gentleman—who had the opportunity of having his case fairly heard thirty years ago—cannot now, after the death of the person principally concerned, be in a position to ask that the principle of *res judicata* shall not be pressed to its fullest and furthest results.
3. *Per LORD SELBORNE*: When there is *res judicata* the original cause of ac-

tion is gone; and it would be destructive of all certainty in the administration of law, in the status of families, and in the enjoyment of rights, if it were not held incumbent on any one attempting to get rid of a solemn judgment to show that he comes forward to do so with reasonable promptitude and diligence.

4. *Per LORD BLACKBURN*: The object of the rule of *res judicata* is always put upon two grounds; the one, public policy, that there should be an end of litigation; the other, the hardship on the individual that he should be vexed twice for the same cause. It seems to me that nothing is here alleged that would have been ground for a new trial before, and *à multo fortiori* there is nothing alleged that would be ground for a new trial after, judgment pronounced thirty years ago.

5. *Per LORD GORDON*: It would be lamentable for the law of Scotland, especially with reference to the marriage law, if it were competent for parties to come forward again after a lapse of thirty years and ask for a new trial with reference to matters which must have been within their own knowledge when the cause was originally tried. *Lockyer v. Ferryman*. 89

See WRONGDOERS, 336, 340 note.

FRANCHISE.

1. When mortgage by corporation transfers interest in real estate thereof. *Chandler v. Howell*. 815, 824 note.

See EMINENT DOMAIN, 295, 308 note.

FRAUD.

1. By agreement between the defendant and the promoters on behalf of an intended company the defendant agreed to sell to the company several patents belonging to, and several businesses carried on by, him. The company was incorporated under the Com-

panies Acts, 1862 and 1867, the memorandum of association describing the objects of the company, amongst others, as the purchasing or acquiring the businesses and patents belonging to the defendant, and working the patents. The articles of association, which were dated and registered on the same day as the memorandum of association, set out the agreement with the defendant, and declared that it should be binding upon the company and read as part of the articles themselves. By the agreement itself, the defendant was to be chairman of the board of directors and managing director of the company for five years, and to be paid such salary as the company might determine. The purchase-money was to be paid the defendant, part in fully paid-up shares and the balance by instalments in money. The defendant on his part promised to guarantee to the company a minimum dividend of £15 per cent. on all the paid-up capital of the company. The company carried on the businesses for one year under the agreement, and the defendant paid them the amount sufficient to make up the £15 per cent. Shortly afterwards a resolution was passed by the directors and carried at a general meeting duly convened for the purpose, whereby the defendant was released from his guarantee upon surrendering his shares and giving up to the company his right to certain patents. The defendant retired accordingly from his office as director, giving up his shares and right to the patents, and the company proceeded to sell one of the businesses and one of the patents. The company afterwards claimed to set aside the resolution and enforce the guarantee, on the ground that the defendant had fraudulently misdescribed the property sold by him :

Held, first, that the resolution was not in excess of the powers of the company, and was binding on them: secondly, that assuming that the resolution had been passed in consequence of fraudulent misrepresentations on the part of the defendant, his position had been so far changed that it was too late for the company to repudiate their contract. *Sheffield, etc. v., Unwin.* 286

See BANKRUPTCY, 127, 841.

CHATTEL MORTGAGE, 839.

FRAUDULENT CONVEYANCE.

TRUSTS AND TRUSTEES, 762, 774 note.

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FRAUDS, STATUTE OF.

1. A lease, not under seal, for an original term of less than three years, whether by parol or in writing, is invalid, if it gives a right to the lessee to continue the holding beyond three years from the making of the lease. *Hand v. Hall.* 568, 570 note.

FRAUDULENT CONVEYANCE.

1. Under a marriage settlement the son by a former marriage of the intended husband took an interest in property brought into settlement by the husband :
Held, that the son was a volunteer, and that to the extent of his interest the settlement was void as against a subsequent purchaser from the husband. *Price v. Jenkins.* 707
2. A trader executed a bill of sale of his stock-in-trade in his shop and his furniture in his dwelling house to secure a debt. The shop and the dwelling house were situate in different streets in the same town. An agent of the bill of sale holder took possession of the stock-in-trade just before the debtor filed a liquidation petition, but he did not take possession of the furniture till after he had received notice of the filing of the petition :
Held, that the possession taken of the stock-in-trade operated as a withdrawal of the consent of the mortgagee to the furniture remaining in the debtor's order and disposition.
3. The day before the possession was taken the mortgagee had instructed his agent to go and take possession of the property.
4. *Semble*, that the giving of these instructions amounted to a withdrawal of the mortgagee's consent to the property remaining in the debtor's order and disposition. *Matter of Eslick.* 717
5. The grantee of a bill of sale and the trustee in bankruptcy of the grantor were in concurrent possession of the property comprised in it. The grantee had taken possession first. The trustee impeached the validity of the bill of sale. Before the question of its

validity had been decided, the grantee forcibly removed part of the property:

Held, that, notwithstanding the fact that the grantee had taken possession first, the removal was an unlawful act, and that the grantee must pay the trustee's costs of a motion (which had been refused in the county court) to compel the restoration into the joint possession of the property which had been removed. *Matter of Fells*. 730

See BANKRUPTCY, 758.
FRAUD.

FREIGHT.

See ADMIRALTY, 437.
CHATTEL MORTGAGE, 145.

G.

GENERAL AVERAGE.

See ADMIRALTY, 354.

H.

HEALTH.

See CRIMINAL LAW, 451, 458 *note*.

HEARSAY.

See EVIDENCE, 614, 616 *note*.

HEIRS.

1. Leaseholds are not within Locke King's act, and mortgages thereon must be paid by the personal representative. *Hill v. Wormsley*. 824, 826 *note*.

See DEATH, PRESUMPTION OF.
POWER, 778.

HUSBAND AND WIFE.

See DOWER, 805.

EXECUTORS AND ADMINISTRATORS, 730.
LARCENY, 866, 870 *note*.

I.

ILLEGAL AGREEMENT.

See RESTRAINT OF TRADE, 800, 803 *note*.

ILLEGITIMATE CHILDREN.

See POWER, 778.

INDICTMENT.

See CRIMINAL LAW.

INDORSER.

See SET-OFF, 99.

INFANT.

1. A deed by an infant to secure the repayment of money advanced for necessities is voidable.
2. Where the plaintiff had advanced money to an infant partly in order to pay for necessities, and he had by deed assigned to the plaintiff his reversionary interest as a security,—in an action brought against the infant on his attaining twenty-one, for an account of moneys advanced to him and expended on necessities, and for repayment, and also claiming that the same might be declared to be a charge on his reversionary interest:
Held, that, though the plaintiff was entitled to an account and an order for repayment, the deed was not bind-

ing on the infant, and the security could not be enforced. *Martin v. Gale*. 660, 663 note.

INJUNCTION.

See COPYRIGHT, 652.
RESTRAINT OF TRADE, 800, 803 note.

INSURANCE, LIFE.

1. S. having effected two policies on his life for the purpose, as he expressly informed the assurance company, of enabling him to give C. a security for a debt which exceeded the amount of the policies, deposited them with C., at the same time asking him by letter to instruct his, C.'s, solicitor "to prepare the necessary assignment." C., however, never took any assignment. S. died insolvent, having made a will appointing executors, but no representation was taken out to his estate. C. then gave the company notice in writing of the death, and that he held the policies as security for his debt, and the company acknowledged the receipt of the notice in the terms of the Policies of Assurance Act, 1867, s. 6. Proper evidence of S.'s death having been subsequently produced to the company, they wrote to C. that the claim under the policies would be paid at the expiration of three months, but that the assent of S.'s legal personal representative would be required before settlement.

After the expiration of the three months C., being unable to obtain payment of the policy moneys (although his debt was admitted by S.'s executors, and he offered the company an indemnity), brought an action for that purpose against the company, insisting that S.'s deposit and letter constituted an equitable assignment of the policies within the Policies of Assurance Act, 1867, and therefore enabled him to give a valid discharge for the moneys:

Held, that there had been no equitable assignment of the policies within the act, and that the company were justified in refusing to pay him in the absence of S.'s legal personal representative:

2. *Ordered*, payment of the policy moneys to the plaintiff after deducting the company's costs, the legal personal representative being dispensed with under the power given to the court by sect. 44 of the Chancery Amendment Act, 1852 (15 & 16 Vict. c. 86): also payment by the company of interest at 4 per cent. from the day which had been fixed by them for the payment of the principal. *Crossley v. Glasgow Life Assurance Co.* 653

See PRESUMPTION, 59, 87 note.

INTENT.

See CRIMINAL LAW, 384, 389 note.

ISSUE.

See DEATH, 547, 557 note.
LIFE ESTATE, 647.

J.

JOINT DEBTORS.

See BANKRUPTCY, 126.

JUGGLERS.

1. The appellant was convicted by justices under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond "every person . . . using any subtle craft, means, or device *by palmistry or otherwise* to deceive and impose on any of His Majesty's subjects." In a case stated for this court, the justices found as a fact that the appellant attempted to deceive and impose upon certain persons by falsely pretending to have the supernatural faculty of obtaining from invisible agents and the spirits of the dead answers, messages, and manifestations of power, namely, noises, raps, and the winding up of a musical box:

Held, that the means used by the appellant came within the words "by palmistry or otherwise," and that the conviction was right. *Monck v. Hilton*. 536

JURISDICTION.

1. By Order LV, where an action is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the judge before whom such action is tried or the court shall otherwise order. By Order LVII, Rule 6, a court or a judge shall have power to enlarge the time appointed by these rules for doing any act. By s. 39 of the Judicature Act, 1873, any judge of the High Court may exercise any jurisdiction of the court exercised before the act by a judge at chambers. A jury returned a verdict for a small amount beyond a sum paid into court; no application as to costs was made at the trial; but some time afterwards the judge who tried the action, sitting at chambers, made an order depriving the plaintiff of costs from the time of the payment into court. On appeal, the Divisional Court set aside the order for want of jurisdiction. On appeal to the Court of Appeal:

Held, that the judge had no jurisdiction: Either, 1. As the judge who tried the action, because no application had been made at the trial as required by Order LV; and Order LVII, Rule 6, did not apply to the case. Or, 2. As the judge at chambers, because Order LV expressly confined the power to the court, and s. 39 did not apply, as no such power existed before the act. *Baker v. Oakes*. 256

2. Claim, stating that the plaintiffs and defendants were each of them limited companies, with registered offices in London; that the action was brought for rent of a railway station in Buenos Ayres (into possession of which the defendants were put by the plaintiffs), and for part of the cost of constructing lines of railway and approaches to the station.

Defence, that the plaintiff and defendant companies were domiciled in the Argentine Republic, and carried on business there; that the premises in

question were constructed on land which was the property of the republic, and that the plaintiffs and defendants were joint concessionaires under the republic of certain easements appurtenant thereto. That the construction of the premises was directed by the government of the republic, and was for the benefit and convenience of the citizens of Buenos Ayres, and that by the laws of the republic powers of adjusting all rights arising out of the construction, and applicable to the claim of the plaintiffs were vested in the government, and that the contract (if any) as to the cost of the construction was made at Buenos Ayres, and was subject to the law of the place of contract, and that the republic had assumed jurisdiction over the plaintiff's claim:

Held, on demurrer, that the defence was bad, as both parties to the action were within the jurisdiction of the English courts, and the facts alleged did not show that the Argentine Republic had exclusive jurisdiction over the claim. *Buenos Ayres, etc., v. Northern, etc.* 282

3. Sect. 527 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, which gives a remedy in certain cases against the owner of a foreign ship for damage done to a British subject in any part of the world, is confined to damage to property, and does not extend to injury to the person.
4. The ordinary courts of this country have no jurisdiction over acts done by foreigners on the high seas below low-water mark: consequently, Order XI, Rule 1, of the Rules of 1875, does not warrant an order for the service of a writ on a foreigner residing abroad, in respect of a cause of action arising at sea below low-water mark, though within three miles of the English coast. *Harris v. Owners of The Franconia*. 446

See APPEARANCE, 572.

L.

LACHES.

See FORMER SUIT, 89.

LANDLORD AND TENANT.

1. When and for how long oral lease good. *Hand v. Hall.* 568, 570 note.

See FORFEITURE, 15, 29 note.

LEASE.

RENT.

SPECIFIC PERFORMANCE, 676.

LAPSE.

See WILLS, 796.

LARCENY.

1. A wife, though she may have committed adultery, cannot steal her husband's goods: and therefore the adulterer, receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods. *Regina v. Kenny.* 866, 870 note.

LAW OF NATIONS.

See JURISDICTION, 282, 446.

LEASE.

1. When and for how long oral lease is good. *Hand v. Hall.* 568, 570 note.
2. Leaseholds are not within Locke King's act, and mortgages thereon must be paid by the personal representative. *Hill v. Wormsley.* 824, 826 note.

See LANDLORD AND TENANT.

RENT.

SPECIFIC PERFORMANCE, 676.

LEGATEE.

1. When cannot be made to refund though overpaid. *Hilliard v. Fulford.* 641

See WILLS.

LEGITIMACY.

See PRESUMPTION, 225.

LEX LOCI.

1. The petitioner and respondent, Portuguese subjects and first cousins, came to reside in England in 1858. In 1866 they went through a form of marriage before the registrar of the district of the city of London. In 1873 they returned to Portugal, and continue to reside there. By the law of Portugal a marriage of Portuguese subjects, being first cousins, without dispensation, wheresoever contracted, is invalid:

Held, that the court of the place of contract of marriage is not bound to recognize the incapacities affixed by the law of the domicile of the parties to a contract of marriage, if such incapacities do not exist according to the *lex loci contractus*, and to pronounce a marriage, otherwise valid, to be null and void by reason of such incapacity. *Sottomayor v. De Barros.* 605

2. The deceased, a Frenchman by birth, but naturalized in England, executed at Paris a will and codicil in the English form relating to his property in England only, and a holograph will, signed and dated, disposing of his property in France, but referring directly to the English will. He died at Paris:

Held, that if it could be shown that the will and codicil in the English form were made in a form permitted by the law of France in the case of British subjects resident in France, they could be admitted to probate under 24 & 25 Vict. c. 114, s. 1, as valid according to the law of the place where made. *Matter of Lacroix.* 617

See CARRIER, 525.

JURISDICTION, 282.

LIBEL.

1. The plaintiffs, vocalists, advertised in a theatrical newspaper, as follows: "The Sisters Hartridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co." (music

publishers), "and others, for their kind unhesitating permission to sing any morceaux from their musical publications." The defendant, who was interested as agent for the proprietors of the "stage-right" of certain songs published by the firms mentioned, wrote to the proprietors of two music halls at which the plaintiffs were engaged to sing, to the effect that the advertisement, if relied upon in every particular, was calculated to lead them to incur penalties under the Copyright Act, inasmuch as the publishers named had in some instances no power to give the alleged permission, and insinuating that music hall singing was not calculated to create a demand for their musical publications. Upon a motion to set aside a nonsuit:

Held, that, inasmuch as the letters were reasonably susceptible of a construction which would make them libellous, the opinion of the jury ought to have been taken upon their meaning. *Hart v. Wall.* 421

2. The administration of the poor-laws, both by the government department and by the local authorities, including the conduct of the medical officers, is matter of public interest; but the publication of a report of proceedings at a meeting of poor-law guardians, at which *ex parte* charges of misconduct against the medical officer of the union were made, is not privileged by the occasion. *Purcell v. Sowler.* 478

LICENSE.

See SPECIFIC PERFORMANCE, 676.

LIEN.

1. Agreement that debts due stockbrokers shall be first paid not valid. *Ex parte Saffery.* 758

See ADMIRALTY, 487, 507.

BUILDING CONTRACT, 738.

CHARTERPARTY, 309.

VENDOR AND VENDEE, 691, 696 note, 758.

LIEN OF ATTORNEYS.

See BANKRUPTCY 735.

LIFE ESTATE.

1. Bequest on the death of testator's daughters without issue to the persons who would be entitled under the statute if testator had then died intestate. Administration action brought in the lifetime of the daughters, and before they had had any issue, by persons who would then be next of kin if the daughters were dead without issue:

Held, on demurrer, that the plaintiffs had only an expectation and not an interest, and were not entitled to maintain the action. *Clowes v. Hilliard.* 647

LIMITATIONS, STATUTE OF.

1. The defendant, whose debt to the plaintiff was barred by the Statute of Limitations, wrote to the plaintiff within six years before action the following letter: "I return to Shepperton about Easter. If you send me there the particulars of your account with vouchers, I shall have it examined and check sent to you for the amount due; but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim:"

Held, that the debt was revived, as the request to be furnished with an account with vouchers at a particular time and place did not negative the implied promise to pay arising from the admission of a balance due. *Skeet v. Lindsay.* 564, 568 note.

LOCAL ACTIONS.

See JURISDICTION, 282.

LOST WILL.

See EVIDENCE, 614, 616 note.

M.

MARRIAGE.

See LEX LOCI, 605.

PRESUMPTION, 225.

MARRIED WOMAN.

See DOWER, 805.

MASTER AND SERVANT.

1. The plaintiff was run over and sustained injuries through furious driving on the part of a cab driver, and brought his action for such injuries against the proprietor of the cab. The arrangement between the proprietor and the driver was that the horse and cab were intrusted by the former to the latter for the day, to be used entirely at the driver's discretion during the day, for the purpose of plying for hire. The driver was to pay 16s. for the cab; all that he made above that sum was his perquisite for his labor, and any deficiency he had to make good afterwards. There was no particular time fixed for going out or returning with the cab. On the day when the accident occurred, the driver was on his way back with the cab to the stables of the proprietor intending to return the cab. When he came to the end of the mews in which the stables were, he went on with the cab to a tobacconist's a little way off and purchased some snuff, and on his way back to the stables the accident happened:

Held, that the proprietor was liable for the acts of the driver while acting within the scope of the purposes for which the cab was intrusted to him, as a master for the acts of his servant, and that the driver was at the time of the accident so acting. *Venables v. Smith*, 345, 349 note.

2. The defendants, having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard, W. to find all labor, the defendants to provide and place at the disposal of W. the necessary engine power, ropes, and hoppets, with an engineer to work the engine (who was employed and paid by the defendants), the engine and engineer to be under the control of W. The plaintiff, who was one of the men employed and paid by W., while working at the bottom of the shaft was injured by the negligence of the engineer:

Held, affirming the judgment of the Common Pleas Division, that though the engineer remained the general servant of defendants, yet being under the orders and control of W. at the time of the accident, he was acting as the servant of W., and not of defendants, who were therefore not liable for his negligence. *Rourke v. White Moss, etc.* 469, 475 note.

See PRINCIPAL AND AGENT, 341, 343 note.

MEMORANDA.

See EVIDENCE, 345, 359 note.

MINES.

See SPECIFIC PERFORMANCE, 676.

MISTAKE.

See EXECUTORS AND ADMINISTRATORS, 641.

MONEY HAD AND RECEIVED.

See EXECUTORS AND ADMINISTRATORS, 641.
INFANT, 660, 663 note.

MORTGAGE.

1. A document,—by which A. agrees to sell to B. "five acres of wheat now standing in, &c., at £8 per acre, B. to cut and carry the corn any time he may require; and B. agrees to purchase the said five acres upon the above conditions,"—is a bill of sale within the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1, as the intention is apparent to pass the immediate property.
2. Growing crops are not "personal chattels" within s. 1, which is defined by s. 7 to "mean goods, furniture, fixtures, and other articles capable of complete

transfer by delivery." *Brantom v. Griffiths*. 475, 478 note.

3. When by corporation transfers entered in real estate. *Chandler v. Howell*. 815, 824 note.
4. Leaseholds are not within Locke King's Act, and mortgages thereon must be paid by the personal representative. *Hill v. Wormsley*. 824, 826 note.

See ADMIRALTY, 437.
 CHATTEL MORTGAGES.
 DOWER, 805.
 FIXTURES, 723, 728 note.
 PLEDGE, 782, 784 note.

MOTIVE.

See CRIMINAL LAW, 284, 289 note.

N.

NAME.

1. Where name not full or indefinite, how person intended to be ascertained.
Matter of De Rosaz. 597
Matter of Blackwell. 602

NAVIGABLE RIVER.

See NEGLIGENCE, 850, 854 note.

NEGLIGENCE.

1. If servant has coal hole in sidewalk open, and negligently allows a passer by to fall into the same, master liable. *Whiteley v. Pepper*. 341, 343 note.
2. The plaintiff was the occupier of land and the defendant the owner of adjoining land, both fronting to a creek communicating with the sea. It was necessary for the protection of his land that each person having land fronting

the creek should maintain a sea wall to keep out the high tides, and such sea wall had been maintained along the creek time out of mind. The plaintiff's wall was continuous with the defendant's, and the level of the defendant's land was higher than that of the plaintiff's. It became necessary from time to time to put fresh materials on the top of the walls to keep them up to the proper height; the defendant had neglected so to top his wall, and owing to an extraordinary high tide, the water flowed over his wall, and so from the defendant's land on to the plaintiff's land, doing considerable damage:

Held, affirming the judgment of the Queen's Bench Division, first, that the mere fact that each frontager had always maintained the wall in front of his land, and that no one had thought it necessary to erect a wall to protect his land from the water which might come from his neighbor's land, was no sufficient evidence to establish a prescriptive liability on the part of the defendant to maintain the wall for the protection of the adjoining land-owners:

3. Secondly, that by the common law, apart from prescription, no such liability was cast on the defendant, as a frontager. *Hudson v. Tabor*. 350, 354 note.
4. The plaintiff was a passenger by the defendants' railway, and at one station, though all the seats in the carriage in which the plaintiff was were filled, three more persons got in and stood up. There was no evidence that the defendants' servants were aware of this, but the plaintiff remonstrated with the persons who had so got in. At the next station, the door of the carriage was opened by persons who tried to get in, and the plaintiff rose and held up his hand to prevent them. After the train had started, a porter pushed away the persons who were trying to get in and slammed the door, which caught and injured the hand of the plaintiff, who had been thrown forward by the motion of the train:

Held, by Cockburn, C.J., and Amphlett, J.A. (Kelly, C.B., and Bramwell, J.A., dissenting), affirming the decision of the Court of Common Pleas, that there was evidence from which the jury might infer negligence on the part

of the defendants so as to entitle the plaintiff to recover damages. *Jackson v. Metropolitan Railway.* 402

See ADMIRALTY, 573, 582.

CARRIER, 525.

MASTER AND SERVANT, 345, 349 note.

NUISANCE, 500, 506 note.

NEGOTIABLE INSTRUMENT.

See BANKRUPTCY, 841.

BONA FIDE HOLDER, 276, 280 note.

NOTICE.

See BONA FIDE HOLDER, 276, 280 note.

BANKRUPTCY, 127.

FORFEITURE, 15, 29 note.

NUISANCE, 500, 506 note.

TRUSTS AND TRUSTEES, 762, 774 note.

NUISANCE.

1. The plaintiff and the defendant were respectively occupiers of adjoining houses. An old drain which commenced on the defendant's premises, and thence passed under and received the drainage of several other houses, turned back under the defendant's house, and thence under the cellar of the plaintiff's house, and ultimately into a public sewer. The part of the return drain which passed through the defendant's premises being decayed, the sewage escaped and flowing into the plaintiff's cellar did damage. The defendant was unaware of the existence of this return drain, and consequently of its want of repair:

Held, that the defendant was liable for the damage done to the plaintiff: for that defendant's duty was to keep the sewage which he himself was bound to receive from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel, and that this duty was independent of negligence on his part, and independent of his knowledge or ignorance of the existence of the drain. *Humphries v. Cousins.* 500, 506 note.

20 ENG. REP.

110

O.

OFFICERS.

1. Where a board constituted by an act of Parliament are authorized by it to delegate any of their powers to a committee, the powers so conferred upon the committee must be exercised by them acting in concert; and it is not competent to the committee to apportion amongst themselves the duties so delegated to them; and one of them acting alone, pursuant to such apportionment, cannot justify his acts under the act of Parliament. *Cook v. Ward.* 514, 522 note.

ONUS.

See AGREEMENT, 171, 199 note.

OWNER, 826.

PRESUMPTION, 225.

OWNER.

1. When may take gravel, marl, loam and subsoil from common. *Hall v. Byron.* 826

See NEGLIGENCE, 341, 343 note; 350, 354 note.

P.

PALMISTRY.

See JUGGLERS, 536.

PARTNERSHIP.

1. To prove the existence of a company it is sufficient to prove that it had carried on business as such. *Regina v. Langton.* 355, 359 note.
2. H., a banker, took into partnership K., a country gentleman unacquainted

with banking, who was not bound to bring in any capital or to attend to the business. K. did not acquaint himself with the accounts, though he occasionally came to the bank. H. from time to time fraudulently drew large sums out of the bank, and employed them in losing speculations on the Stock Exchange, concealing the overdrawings by means of fictitious entries in the books of the bank. K. never drew out anything. On the death of H. the bank was found utterly insolvent, and K. was adjudicated bankrupt. A decree was made for the administration of the estate of H., under which the trustee in bankruptcy of K. claimed to prove for what was due from H. for moneys thus fraudulently drawn out:

Held, by the Court of Appeal (James, L.J., Mellish, L.J., and Baggallay, J.A.), affirming the decision of the Master of the Rolls, that he was entitled to prove:

3. *Held*, further, that the rule in *Clayton's Case* could not be applied to fraudulent overdrawings. *Lacey v. Hill*. 739, 755 note.

See AGREEMENT, 171, 199^{note}.
BANKRUPTCY, 126.

PATENT.

1. A licensee under a patent cannot, in any way, question its validity during the continuance of his license. But he may show that what he has done (in respect of which patent royalties are claimed from him) does not fall within the limits of the patent, but is something extraneous to it.
2. *Per LORD BLACKBURN*: A licensee under a patent is in a situation analogous to a tenant, who, during the tenancy, cannot dispute the title of the lessor to any of the land held under the lease; but who is, nevertheless, at liberty to show that part of the land he actually occupies is really not comprised within the lease, but belongs to himself under some other right:
3. *Semble*, that in an action on a patent, where such an issue has been raised, evidence of the existence of foreign specifications of an earlier date, pre-

served in and obtained from the Patent Office, might be admissible.

4. Observations on this matter.
5. The words used in a patent must be construed, like the words of any other instrument, in their natural sense, according to the general purpose of the instrument in which they are found.
6. In this case the word "parallel" was construed in its popular and not its purely mathematical sense. *Clark v. Adie*. 1
7. Patentees of lamp-burners claimed by their specification as their invention the construction of burners "in the manner described and illustrated in the figures, that is to say, the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat wicks are placed so as to produce thereby one or more flat flames, or elliptical or nearly circular flames."
The figures referred to showed burners with two wicks passing through a double-slotted cone. The use of two wicks with a single-slotted cone was old:
Held, that the claim could not be read as limited to burners with a double-slotted cone, and that the patent was bad for want of novelty.
8. A description in the specification of a lamp-burner omitted to state where the hole for the admission of air was to be:
Held, that the specification was insufficient. *Hinks v. Safety Lighting Co*. 785

PAYMENT.

See FORGED CHECK, 426.

PERFORMANCE.

1. The construction of a contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the court.

2. Two contracts, each for the sale of 300 tons of rice, were made in London. The first contract (which the second exactly followed) was for 300 tons "of Madras rice, to be shipped at Madras, or coast, for this port, during the months of March ^{and}_{or} April, 1874, per Rajah of Cochin." The 600 tons filled 8,200 bags. The vessel arrived at Madras in February, and on the 23d of that month 1,780 bags were put on board, and on the 24th of February a like number; on the 28th of February 3,560 bags were put on board, and bills of lading were given for those amounts on the days mentioned. A bill of lading for the remaining 1,080 bags was given on the 3d of March, but all, except fifty bags, had been put on board before that day. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March ^{and}_{or} April:

Held, that the contract had not been complied with; that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given in this case, the plaintiffs could not recover on the contract.

3. *Per LORD BLACKBURN*: If an article sold is described, the description amounts to a warranty or a condition precedent that it shall be an article of the kind described.
4. The judgment of the Court of Appeal was reversed, and that of the Court of Queen's Bench restored, with costs.
5. Observations on "shipped" and "shipment." *Bowes v. Shand*. 80

See BUILDING CONTRACT, 738.
CHARTERPARTY, 266.

PLAINTIFFS.

1. Questions between co-defendants may be raised by a pleading which states both a defence as against the plaintiff and a claim against a co-defendant, but such pleading is not a counter claim under Order XXII, rule 5, and should not be so intitled.

2. Delivery of such pleading to the co-defendant is sufficient notice under Order XVI, rule 17. *Furness v. Booth*. 775, 777 note.

PLEDGE.

1. The doctrine that an equitable mortgagee by deposit of title deeds is entitled to foreclosure, does not extend to a pledgee of personal chattels.
2. A. deposited with B. certain Canada railway bonds as security for a debt. On bill filed by B. for foreclosure or sale:
Held, that B. was entitled to an order for sale only. *Carter v. Wake*. 782, 784 note.

POWER.

1. Testator, after stating that he was desirous that a farm which he occupied should be carried on during the life of his wife for the maintenance, support, and benefit of herself and all his children, and that upon her death all his property both real and personal should be "fairly and equally divided" among "all" his children, and that the property which his three children by a former marriage had derived should be brought into hotchpot from the time of his decease, "so as to form one common fund," appointed his wife "and her two brothers, W. C. and R. C., trustees and executors" of that his will; and for the purpose of management authorized and empowered them to sell and convert into money all or any part of his said real and personal estates, or to mortgage or let the same or any part thereof, and invest the proceeds as therein mentioned. Testator directed and empowered his "said trustees and executors" to carry on the farm "by and out of" his assets "for the maintenance, support, and benefit of" his wife and children; and subject thereto declared that his real and personal estate, "and the proceeds thereof" should be held in trust for all his aforesaid children, in equal shares; the personal property to which the children by his first marriage had become

entitled being brought into hotchpot, to be vested interests at twenty-one, or on death under that age leaving lawful issue:

Held, that upon the death of the widow the surviving trustees and executors had power to sell and convey the real estate without the concurrence of the children. *Matter of Cooke*. 681, 690 note

2. K. by his will gave a fund upon trust for such of the "children" of his daughter M. (who was then married) as she should by will appoint, and, in default of appointment, for her children equally. The will contained no hotchpot clause. M. had several children, some of whom were illegitimate, having been born before her marriage. By her will she appointed the fund to her "children E. and C., their executors, administrators, and assigns, for their own use and benefit." E. was one of the illegitimate and C. one of the legitimate children:

Held, reading M.'s testamentary appointment as indicating an intention to appoint the fund in moieties, that one moiety passed to C. under the appointment, and that the other moiety, E. not being an object of the power, was divisible among all the legitimate children, as in default of appointment. *Matter of Kerr's Trust*. 778

See OFFICERS, 514, 522 note.

PRESCRIPTION.

See NEGLIGENCE, 350.

PRESUMPTION.

1. A policy on the life of R. Nutt was granted in 1863. An action was brought upon it in 1874, and the question was whether Nutt was then alive or dead. He had been absent from his former home for more than seven years, having left it in 1867. His sister and brother-in-law, who lived where he had formerly lived, gave evidence as to his absence, and said that they had not heard of him for more than seven years. On cross-examination, they said that a

niece of his had said that when she was in Melbourne, in December, 1872, or January, 1873, she saw a man whom she believed to be her uncle Nutt, but he was lost in the passing crowd before she was able to get to speak to him. No effort appeared to have been made to find him at Melbourne, and the other relatives believed the niece to have been mistaken. The jury expressed a similar opinion. The judge directed the jury that they "could not say that the man had not been heard of during the last seven years when one of his relatives declared that she had seen him alive and well within the last three years; and still less could they say that he had never been heard of, when all the members of the family stated that they had heard what she had stated," and "that the ground for the presumption of death from a man having been absent for seven years was entirely removed by the direct evidence that every relative had heard that he was alive." And, lastly, his Lordship said to the jury, "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove exactly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendants." The Court of Appeal had considered this to be a misdirection, and had ordered a *venire de novo*. On appeal to this House, the Lords were equally divided, and so the decision of the appeal court stood affirmed.

2. *Per LORD BLACKBURN*: When there is a case tried before a judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the judge is to give a direction upon the law to the jury, so far as to make them understand the law as bearing upon the facts. Farther than that it is not necessary for him to go. *Prudential Assurance Co. v. Edmunds*. 59, 87 note.
3. Where, after open courtship and constant intercourse, a man and woman (she being ultimately in an advanced state of pregnancy), hurry on their marriage to prevent, or to mitigate, scandal; and where in less than seven weeks after the marriage she gives birth to a child; the presumption of

the husband's paternity to that child is next to insuperable.

Per THE LORD CHANCELLOR: The presumption is not a *presumptio juris et de jure*, but a presumption of fact:

4. *Held*, by the House, affirming the decision of the Second Division of the Court of Session, that the *onus* of establishing the husband's denial of paternity lay on himself, and that he had wholly failed to discharge that *onus*. *Gardner v. Gardner*. 225

See CRIMINAL LAW, 391, 392 *note*.

DEATH, 547, 557 *note*.

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OWNER, 826.

WILLS, 589, 594 *note*.

PRINCIPAL AND AGENT.

1. The carman of the defendant, a coal merchant, for the purpose of delivering coals at the premises of a customer, removed an iron plate in the footway which covered an opening communicating with the coal cellar. The plaintiff was passing along the footway at the time. The carman gave her no warning that the plate was taken up, and in consequence of his negligence in not taking due precautions, without any want of due care on her part, she fell into the opening and sustained injuries:

Held, in an action against the defendant for negligence, that he was responsible. *Whiteley v. Pepper*. 341,

343 *note*.

See CRIMINAL LAW, 242, 255 *note*.

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See CARRIERS, 323.

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REAL ESTATE.

1. The act for improving the town of Abberystwith, and supplying the inhabitants thereof with water, vested in the commissioners thereunder the works and the soil thereof, and authorized them to purchase land, to construct and carry on waterworks and gasworks, and to make rates upon occupiers of lands, and recover them by distress.

2. Mortgages by the commissioners whereby, under the borrowing powers conferred by the act, they granted and assigned the "works, rents, and rates," authorized by the act, to the lender until the sum borrowed should be repaid:

Held, to confer upon the lender an interest in land within the Statute of Mortmain. *Chandler v. Howell*. 815, 824 *note*.

REAL ESTATE, OWNER OF.

See NEGLIGENCE, 341, 343 *note*; 350, 354 *note*.

OWNER, 826.

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RENT.

1. Claim for use and occupation, stating that the plaintiffs and defendants entered into an agreement for the purchase by the plaintiffs of warehouses and premises belonging to the defendants. That by the agreement the purchase was to be completed and possession given to the plaintiffs on the 29th of September, 1869, up to which time all outgoings were to be paid by the defendants, and from which time the plaintiffs were to receive all rents and profits, the plaintiffs to pay interest on the purchase-money from the 29th of September until the completion of the purchase. That in fact the purchase was not completed till the 13th of March, 1876, though the plaintiffs were ready and anxious to have completed it at an earlier date. That the plaintiffs paid the purchase-money by instalments on various dates prior to the 13th of March, 1876, and interest on the same according to the agreement. That the defendants refused to give up possession on the completion of the purchase, &c., but the plaintiffs obtained possession by warrant from the sheriff on the 3d of April, 1876:

Held, that under the words "all rents and profits" in the agreement, the plaintiffs were entitled to a fair occupation rent, and that it was immaterial whether or not the occupation would by itself have been sufficient to support the action. *Metropolitan Railway v. Defries.* 272

RES ADJUDICATA.

See FORMER SUIT, 89.

RESCISSION.

See FRAUD, 286.

RESTRAINT OF TRADE.

1. A covenant—not to carry on, or be concerned in carrying on, either directly or indirectly, the business of a saddler, or sell any goods in any way connected with that trade within a distance of ten miles from C. under a penalty of £100, to be paid by way of liquidated damages for every such offence—is broken by selling goods as a journeyman in the employment of a person carrying on the particular trade in C.; and the breach will be restrained by injunction. *Jones v. Heavens.* 800, 803 *note*.

REVOCATION.

See WILLS, 603, 620.

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SET-OFF.

1. *Per* LORD BLACKBURN: The law of Scotland on the subject of compensa-

tion and retention in bankruptcy is, in effect, very nearly, if not precisely, the same as the law of England with respect to mutual credit.

2. *Per LORD BLACKBURN*: I think the law is tersely and accurately expressed by Lord Ormidale in the court below. He says: "I can neither find authority, nor see any good reason for holding, that the circumstance of a party having a collateral security for his debt is destructive of his right of compensation or set-off—supposing it to be otherwise well founded."

3. *Per LORD BLACKBURN*: It has for many years been decided, both in England and in Scotland, that if the indorser of a bill became a party to the bill before the bankruptcy, he may set it off on becoming holder afterwards. *McKinnon v. Armstrong.* 99

SETTLEMENT.

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SHIPS AND VESSELS.

See CHATTEL MORTGAGES, 145.

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See LIBEL, 421, 478.

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See LIBEL, 421.

SPECIFIC PERFORMANCE.

1. A., on the application of B. and C., agreed to grant them a lease of a vein

or seam of coal, called the S. vein, "about two feet thick, with the overlying and underlying beds of clay," on and under a farm called X., at £100 per annum as certain or dead-rent, and royalties of 9d. per ton for the coal and 4d. per ton for the clay; the lessees to have any part of the farm at the rent of £10 per acre, and to expend not less than £500 in the erection of a manufactory and buildings for the purpose of working the coal and clay; way-leave of 1d. per ton for foreign coal and clay; lessees to have power to determine the lease at the end of three years on giving one year's notice.

On action by A. for specific performance, B. and C. alleged that the S. vein did not exist under the farm, and it was proved that on search it had not been found, but counter evidence was given to show that the searches were insufficient:

Held, that, under the agreement, B. and C. had, in consideration of the dead-rent reserved, obtained license to enter and search for the vein, but not a warranty that such vein was to be found; and, accordingly, that A. was entitled to specific performance of the contract whether the S. vein existed or not. *Jefferys v. Fairs.* 676

See VENDOR AND VENDEE, 691, 696 note.

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TRUSTS AND TRUSTEES.

1. *Per* THE LORD CHANCELLOR: Where trustees acquire a benefit as ostensible owners of trust property, that benefit cannot be retained by them, but must be surrendered to those who are beneficially interested.
2. *Per* LORD O'HAGAN: The law of Scotland, equally with the law of England, condemns the misuse of a fiduciary position, and declares that any advantage wrongfully gained by a trustee shall enure to the benefit of the *cestui que trust*.
3. *Per* LORD O'HAGAN: Where a trust has been broken by the trustees for

their own benefit, and to the injury of the *cestui que trust*, no lapse of time can validate the transaction.

4. Where the trustees of land affecting actual ownership acquire from the Crown a right of salmon fishing in the adjacent sea, the acquisition enures to the benefit of the *cestui que trust*.
5. Cause remitted back to the Court of Session to consider the question of retrospective accounting, as to which the House expressed no opinion. *Aberdeen v. Aberdeen University*. 111, 124 note.
6. The promoters of a company, who were also directors, purchased land and sold it to the company at an increased price, retaining the difference for themselves. Part of the purchase-money was paid in debenture bonds. After the company had gone into liquidation, L., a director, but not one of the promoters, purchased 100 of the debentures at 25 per cent., for which he claimed to prove:
Held, by Malins, V.C., that L., as a director, could not plead ignorance of the purchase by which the shareholders were defrauded; that, having been in the position of a trustee for the shareholders, he could not, by the purchase of debentures after the insolvency, make a profit out of a transaction which, as such trustee, he ought to have prevented, and that the claim must be disallowed.
7. On the claim being heard by the Court of Appeal the matter was compromised on the terms of the official liquidator paying to L. the amount which he actually paid for the debentures, with interest from the date of purchase. *Matter of Larking*. 762, 774 note.

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VENDOR AND VENDEE.

1. By marriage settlement real estate was limited to such uses as A. and B. (husband and wife) should appoint, and in default of appointment to the use of trustees during the life of B., in trust for her separate use, with remainder to A. in fee. A. entered into a contract to sell the property to C., who had notice of the provisions of the settlement; and in the contract it was stated that A. would "procure a proper assurance of the premises to the purchaser to be executed by all necessary parties." The purchase-money was paid by C. to the trustees of the settlement, and by them invested pursuant to the contract; and a draft conveyance in the form of a joint appointment by A. and B. to C. was approved, but before executing it A. died suddenly. B. having after A.'s death refused to convey her life interest:

Held, that C. was entitled to specific performance to the extent of A.'s re-
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version in fee, with compensation in respect of B.'s life interest, and a lien on the invested purchase-money in the hands of the trustees of the settlement. *Barker v. Cox.* 691, 696 note.

2. It was agreed between A. and a trustee for an intended company that as soon as the company was formed and had adopted the agreement, A. should sell and the company purchase A.'s interest in a leasehold brickfield, and that on an assignment to the company being executed the company should pay him as the purchase-money £8,000 in manner thereafter mentioned, namely, £6,000 in cash and £2,000 in fully paid-up shares. The property was assigned to the company by a deed which stated the consideration to be £6,000, to be paid to A. as thereafter mentioned, viz., 50 per cent. on all sums of money to be received from sale of shares, and 50 per cent. on all moneys borrowed by the company by way of capital until the £6,000 was paid. The company became abortive; no money was ever received by sale of shares, or borrowed, and ultimately the company was ordered to be wound up:

Held (affirming the decision of Malins, V.C.), that the nature of the contract was such as to exclude vendor's lien, and that A. had no lien on the leasehold premises. *Matter of Brentwood Brick and Coal Co.* 758

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WILLS.

1. Where the words of a will are unambiguous, they cannot be departed from merely because they lead to consequences capricious or even harsh and unreasonable. But where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result.
2. A testator, E., devised his estates to R. the second, J. the third, and C. the fourth sons of his brother-in-law Sir T. S. (entirely passing over W., the eldest son), and to their sons successively in tail male. By a name and arms clause he directed that as any one became entitled under the will he should assume the name and arms of E. He then introduced a shifting clause, that in case R., or J., or C. "should become the eldest son" of Sir T. S., the E. estates should go over to the next in remainder under his will. The testator died in 1819. Sir T. S. survived the testator. W., the eldest son, succeeded his father in the S. baronetcy, and in the paternal estates; and disentailed and sold them. On his death without issue R. succeeded to the baronetcy. He had long before complied with the name and arms clause in the testator's will, and was in possession of the E. estates. R. died without male issue, and J., the third son, then claimed the E. estates:
Held, that he was entitled to them,

for that upon the true construction of the will he had not "become the eldest son" of Sir T. S., and the shifting clause had therefore not taken effect.

3. *Per* THE LORD CHANCELLOR (Lord Cairns): The eldest son of a man is his first-born—the *primogenitus*; and the words "shall become the eldest son" of a person living at the date of a will cannot, without an explanatory context, be extended beyond the lifetime of that person; they are connected with the heirship of, and right of succession to, a living man.
4. *Per* LORD SELBORNE: In order to give a different construction to the will, the word "surviving" would require to be introduced between the word "eldest" and the word "son." *Bathurst v. Errington*. 203
5. The testator having obtained the lithographed form of a will by which the property was left to all the children absolutely on the death of the wife, filled up the blanks in his own handwriting, and in the place of the bequest to the children interlined the words "To my only son A. B." The bequest to all the children was cancelled by a line drawn through it. No reference was made to the alterations in the attestation clause, nor were any initials placed in the margin to identify them. The surviving attesting witness had no knowledge whether the alterations were made at the time of execution. The testator had one child, a son, by the second wife, who took a life interest under the will, and five children by a previous marriage. The court held that the presumption arising from the ignorance of the witness was rebutted by a declaration of the testator, made previous to the execution of the will, that he intended to provide for the child of the second marriage and by the other circumstances of the case. *Dench v. Dench*. 589, 594 note
6. The deceased, by his will, appointed certain executors, and amongst others "Percival . . . of Brighton, the father." The court admitted evidence of the circumstances under which the deceased made his will, and of the persons about him, in order to satisfy itself who was meant by the imperfect

description of the executor contained therein. *Matter of De Rosaz.* 597

7. The deceased made a will, by which he left all his property to his wife, and made her sole executrix. He subsequently, with his wife, executed a joint will, which was expressed to take effect in case they should be called out of the world at one and the same time and by one and the same accident. By this will they revoked all former wills. The deceased died in the lifetime of his wife:

Held, that the joint will was dependent upon a contingency which did not happen, and was, therefore, inoperative even to revoke a previous will. *Matter of Hugo.* 603

8. The deceased executed a will in 1858, by which she disposed of the whole of her property. In 1860 she executed another will, which commenced "this is the last will and testament of me," &c. It varied and repeated various bequests given in the first will, appointed the same executors for England as in that document, but contained no residuary nor revocatory clauses:

Held, that, from the general tenor of the last will, it was clear that the testatrix did not intend the first will to remain in force, and that it therefore was revoked. *Dempsey v. Lawson.* 620

9. A testatrix made her will in these words: "I, S. G., do bequeath to A. G. all that I have power over, namely, plate, linen, china, pictures, jewelry, lace, the half of all valued to be given to H. G.; the servants in the house who have been a year with me to receive £10, and clothes divided among them; also all kitchen utensils":

Held, that the bequest was not limited to the articles specifically bequeathed, but that the will passed the whole of the personal estate of the testatrix. *King v. George.* 665

10. A testator made a general gift by will of his real and personal estate to trustees upon trusts for sale and conversion, and to hold the proceeds in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, the share of each of his sons to be for his own absolute use and benefit. And he directed that the share of each of his daughters should be held upon trusts

in effect for life for herself for her separate use, and after her death for her children. The will contained provisions for substituting the issue of sons dying in the lifetime of the testator for the sons, but no similar provision for the case of daughters.

A daughter having died in testator's lifetime leaving children who survived him:

Held, that the gift of the daughter's share did not fail, and that her children were entitled. *Unsworth v. Speakman.* 796

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2. If the party injured accepts such com-

pensation he is barred from further proceedings, even where he did not lay the information or, in the first instance, request the magistrate to award compensation. *Wright v. London, etc.*, 336, 340 note.

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